JOINT APPENDIX

VOLUME V

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 16,206, 16,255, 16,376

498

THE ASSOCIATION OF WESTERN RAILWAYS, TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS, EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,		
Appellants,		Nos. 16,206
v.		and 16,376
RISS & COMPANY, INC.,		
Appellee.		
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.,		
Appellants,		No. 16,255
v.		
RISS & COMPANY, INC.,		
Appellee.		

Appeal from a Judgment of the
United States District Court for the District of Columbia

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For the
District of Columbia
FILED OCT 16 1961
Joseph W. Stewart
CLERK

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Relevant Testimony, Depositions or Other Evidence, or Arguments During the Course of the Proceeding

(HEADING OMITTED) - Civil Action 4056-54 - Filed May 23, 1955

ARGUMENT ON OBJECTIONS OF DEFENDANT (2) THE ASSOCIATION OF WESTERN RAILWAYS TO INTERROGATORIES OF MAY 23, 1955.

* * *

32. THE COURT: By the way, why are we postponing the question of whether you are a party? Why don't I have that today?

* * *

MR. LAYNE: It has been postponed, Your Honor, for the very simple reason that at the outset at least in large measure the interrogatories,

32-a the answers to the interrogatories are necessary in order to get the facts upon which you can make the decision as to whether this Court has venue.

MR. BALL: I wanted Mr. Layne to make that statement, because it seems to me that is the one proper purpose of interrogatories at that time, is to relate to the matters that might bear upon the decision of venue. And we have already answered those interrogatories, which we believe relate to the question of venue. We have already filed our answers on those interrogatories. The ones that we are presently objecting to answering are those that we think do not relate to the issue as to venue, but relate to the general issues raised by the complaint generally against -- in other words, the substance of their law suit, rather than the issue of venue.

* * *

33. THE COURT: But the trouble is I am not in a position to know, because all of them, really, all of the interrogatories could conceivably at least bear on the question of whether you belong in the case or not.

34. MR. BALL: That is where we cannot agree with the Court because we cannot see how by any stretch of the imagination many of these interrogatories could relate to the question of whether we are doing business or resident in the District of Columbia, which is the sole issue.

* * *

46 MR. LAYNE: 1-B, sir, I think we are entitled to know because of the history I gave you, as much as we are now able to ascertain it, what the background of the A. W. R. is and what its organization is. It is our belief, our theory at the present time, that the Western Traffic Association and the Association of Western Railways, are in fact one and the same thing.

47 THE COURT: Well, that is what you said before.

MR. LAYNE: That is right. This is going back to find out where the A. W. R. came from and we think it came from the same place that the Western Traffic Association came from and we believe that to be relevant.

THE COURT: I do not. I sustain your objection to 1-B.

MR. BALL: 1-C: "On what date was the A. W. R. organized?"

THE COURT: I sustain your objection to that.

MR. BALL: 1-D: "Give all predecessor organizations to the A. W. R."

THE COURT: I sustain your objection on that.

MR. BALL: "E":

"Did the A. W. R. succeed any of the organizations named in response to Interrogatory 1-D?" --

I assume the same result would follow.

THE COURT: The same ruling.

MR. BALL: To follow down this line, is that the way the Court wishes me to do?

THE COURT: I think so.

MR. BALL: 1-F. "State who organized the A. W. R., including with respect to each individual named his affiliation, if any, with the railroad, naming the railroad and giving his title or position with the railroad."

THE COURT: I sustain your objection to that.

48 MR. BALL: "2. Has the A. W. R. --"

THE COURT: What about "G"?

MR. BALL: Oh, "G". "For what reasons was the A. W. R. organized?"

THE COURT: I sustain your objection to that.

* * *

56 MR. BALL: Number "J," we have objected to that.

"What are the departments, committees and other sub-divisions of A. W. R. ? In answering, give the name of each department, committee or other sub-division and with respect to each:

"(1) Give the name of each member, employee, and agent and state with respect to each his railroad affiliation, if any, including the name of the railroad and his title or position with the railroad;

"(2) State the function of the department, committee, or other sub-division, in the organization and program of the A. W. R. ; and

"(3) Describe the activities of such department or other sub-division. "

THE COURT: I sustain the objection.

MR. BALL: In the case of "K" I call attention primarily to the lack of limitation in time.

"State with respect to the allocation of funds of the A. W. R. the following:

"(1) How these funds are allocated to the activities --"

57 THE COURT: With respect to the matter of time, that is easily curable. Let us get to the heart of the thing.

MR. BALL: We object, also, to their scope here. How funds are allocated -- how funds are allocated to the activities of the A. W. R. departments, committees, and sub-divisions.

THE COURT: I sustain the objection to "K" completely.

MR. BALL: We objected to "L".

"What person, or group of persons, is responsible for determining what activities will be undertaken by, or in behalf of, the A. W. R. , its departments, committees, and other sub-

divisions?"

"* * *Indicate names, titles and positions."

THE COURT: Same ruling. I sustain your objection.

* * *

58 MR. BALL: "O. How many persons are employed by the A. W. R. ?"

THE COURT: Do you object to that?

MR. BALL: We do, yes. I do not know what difference that makes.

THE COURT: How can that possibly be relevant?

MR. LAYNE: Sir?

THE COURT: How can that possibly be relevant--how many persons are employed by the A. W. R.

MR. LAYNE: We won't press that one.

THE COURT: All right. Strike that one.

* * *

MR. BALL: "Q. Describe the duties and responsibilities of each of the principal personnel of the A. W. R." We have objected to that.

59 THE COURT: I sustain the objection to that.

* * *

61 MR. BALL: "T. --

THE COURT: We are rapidly, I hope, running out of letters.

MR. BALL: "State for each year --"

MR. LAYNE: Could I help, too? I tried to tell the Court certain of these --

THE COURT: I would be delighted to have help.

MR. LAYNE: I tried to tell the Court certain of these that we thought under this ruling that should come out, so I do not see why we should read all these. I can help Mr. Ball considerably. We will agree to strike them out.

THE COURT: I am the one who is going to have to decide it.

62 MR. LAYNE: If we can strike certain of them out, he won't have to read them to you.

THE COURT: Wonderful.

MR. LAYNE: We will defer those at least until after we find out whether these people are parties to this action or not. That will refer to "3-T." We will defer that one.

THE COURT: What do you mean by "defer?"

MR. LAYNE: We will strike it now and we will serve them again after the decision of the Court as to whether they are here or not. The same thing with respect to "3-U."

* * *

75 THE COURT: I will require an answer to A(2). You can explain that. A(3), that gives me trouble.

MR. LAYNE: You mean any hotel room leased for a period of a month or longer?

76 THE COURT: Yes. I think that is meaningless. It actually may be that (2) and (3) are fused, one merges with with other.

MR. LAYNE: Well, that may be. We are talking about the lease and not the day to day rental of a hotel room in the District of Columbia.

THE COURT: That is not what you say. You say any hotel room or rooms in the District of Columbia rented or leased.

MR. LAYNE: For a period of a month or longer.

THE COURT: Period of a month, sure. But an executive of this Association could be here for a month and not be transacting business in the District of Columbia.

Every out-of-town newspaper, for instance, according to our Court of Appeals, anyway, is not doing business in the District of Columbia, and they rent office space by the year, or ten years, I do not know.

MR. LAYNE: In any event, Your Honor, we think it is a relevant consideration, that it is a relevant fact to be added to others.

THE COURT: Well, it seems to me that that, too, is an undue burden. I do not think it would prove anything.

Do you object to (3)?

MR. BALL: Yes, sir.

THE COURT: I sustain you.

* * *

86 THE COURT: I will have to err on the side of the weak.

What about "24?"

MR. LAYNE: That apparently is in issue. They objected to that.

THE COURT: Is that objected to?

MR. BALL: Yes. I do not think the problem of coming down, sending somebody into the District of Columbia to appear before a congressional committee can, by any stretch of the imagination, constitute the doing of business in the District of Columbia.

THE COURT: I agree with you completely. I will sustain your objection to "24."

MR. LAYNE: In that case, Your Honor, we withdraw "25" and "26." We also withdraw "27."

* * *

DEPOSITION OF JOSEPH H. HAYS

August 1, 1955

* * *

6 JOSEPH H. HAYS

was called as a witness and, having been first duly sworn by the Notary Public, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT:

Q. Would you state your full name and address?

A. Joseph H. Hays, 280 Union Station Building, Chicago.

Q. Would you state your occupation, please? A. I'm a lawyer.

Q. Employed by whom? A. The Association of Western Railways.

Q. And you're employed full time by them? A. Yes.

Q. You do legal work for anyone else? A. No.

Q. And how long have you been employed as a lawyer by the Association of Western Railways?

A. It's been about seven years.

Q. Will you just tell us in general what the nature of your duties has been during that time?

A. Oh, I'm the head of the Law Department for the Association of Western Railways.

Q. And that Law Department consists of what?

A. Oh, several lawyers and clerical force.

7 Q. Now, who are the other lawyers that are in the department with you?

A. Mr. Amos M. Matthews, Mr. J. W. Nisbet, Mr. Ed White, Mr. J. D. Feeney, Mr. Robert Bernard -- I've forgotten his middle initial -- and Mr. Robert Munsell. And there's Mr. George Hester. Well, he isn't a lawyer. Excuse me.

Q. The ones you have named were all lawyers? A. Yes.

Q. What's the general nature of the legal services that your department performs for the Association?

A. Oh, advice as to legal matters to the Association and defense of cases in which the member roads are concerned. Collection and dissemination of information with reference to matters that member roads are concerned with.

Q. Is that legal information? A. Legal and factual.

Q. And in that connection these lawyers you named, do they have any special functions, or can you tell us briefly, for example, what Mr. Matthews' duties are?

A. Oh, Mr. Matthews primarily assists me. He's concerned with strictly legal brief-writing and legal matters. He engages some of the time in the trial of cases. Mr. Nisbet and Mr. White and Mr. Bernard and Mr. Feeney -- well, not Mr. Feeney -- but those three are engaged almost full time in the handling of matters before the Interstate Commerce Commission.

8 Mr. Feeney part time in matters before the Interstate Commerce Commission and the Civil Aeronautics Board and other administrative agencies. Mr. Munsell is a new man who does some clerical work, assists other counsel about the office.

Q. Now, as I understood you to say, you and your department perform these services on behalf of these member railroads which are involved in certain proceedings?

A. Most of the time.

Q. I suppose the particular railroads that are involved vary, do they, from proceeding to proceeding? A. That's right.

Q. Now, are those individual member railroads for whom you perform these services billed by the Association for those services?

A. Generally not, except to the extent that their general billing includes the cost of the service.

Q. You mean by general billing the assessment that is made for the general expenses of the Association? A. That's right.

Q. Other than that, there is no reimbursement by the --

A. For services, no.

Q. For services? A. No.

9 Q. You say there are some employees of your Law Department who are not lawyers? A. Yes.

Q. What is the nature of the service they render?

A. Well, one is a research engineer

Q. Who is that? A. Mr. George Hester.

Q. And what kind of research does he perform?

A. Oh, engineering research, factual data, tax research.

Q. Well, what kind of engineering research with respect to what kind of transportation?

A. Primarily with respect to highway transportation. Not exclusively.

Q. And any others?

A. Yes. There's Mr. Frank E. Haas who devotes most of his time to relationships with the railroad labor organizations. And Mr. Lyle E. Boren.

Q. Before you get through with Mr. Haas, what kind of relationships are you referring to there?

A. Oh, the discussion of problems and matters with which the labor organizations and members are concerned, problems which are of mutual interest to both the railroad companies and the men and problems which are sometimes adverse in character.

Q. Those are principally legislative matters?

10 A. Some legislative matters.

Q. What others would be of a non-legislative character?

A. Oh, some of the operating relationships between the men and the companies -- transportation, disciplinary action. Generally, however, matters that have some relationship to legislation.

Q. Well, does Mr. Haas participate in any of the actual contract negotiations with the labor representatives?

A. Not directly, no.

Q. How does he do it indirectly?

A. You can't say that he participates in the negotiations, no.

Q. Well, he consults with Mr. Loomis in that connection?

A. Occasionally, sir.

Q. And you mentioned Mr. Hester and Mr. Haas. Are there any other employees of the Law Department who are not lawyers?

A. Yes. There's Mr. Boren.

Q. What is his first name?

A. Oh, he's primarily concerned with legislative matters.

Q. No, I said what is his first name?

A. Lyle E. Boren.

Q. What did you say his duties were?

11 A. Primarily concerned with legislation.

Q. And that would include both Federal and State legislation?

A. Yes.

Q. What does he do in that connection?

A. Oh, he confers with interested parties and discusses our legislative problems.

Q. Sometimes gives testimony?

A. I don't recall that he ever has given any testimony.

Q. And who else is there that's not a lawyer in the department?

A. We have a man on part-time duty.

Q. These are all full-time employees that you mentioned?

A. Yes. A man on part-time duty -- Colonel John W. Wheeler, who is also an engineer.

Q. What kind of an engineer? A. Civil engineer.

Q. And what are his duties?

A. Oh, to advise on factual questions and to aid and assist in research, confer with persons regarding legislative matters.

Q. Well, what kind of factual questions?

A. That are in an engineering category.

12 Q. Well, is this again with respect to truck transportation?

A. Some. Highway matters. Grade-crossing separations.

Q. And you say he's a part-time emplovee? How much of his time?

A. He's been ill for quite some time. He was injured about a year ago.

Q. He's not employed by someone else the rest of the time then?

A. Yes, he's employed by the Burlington Railroad.

Q. And does he have any other employment other than the Burlington and the AWR?

A. I don't believe so. He operates a farm.

Q. Now, is there anyone else in the Law Department?

A. I think that's all.

Q. These duties that the Law Department has, have those remained substantially the same during this seven-year period that you've been head of the department?

A. Oh, generally the same. There's no identical sameness, of course.

Q. Prior to that time what were your duties? What was your occupation?

A. I was a lawyer.

Q. Employed by whom?

A. The Western Association of Railway Executives.

* * *

28 BY MR. WRIGHT:

Q. Mr. Hays, after you were employed by the WARE, did you do anything other than give legal advice to your employer? A. Yes.

Q. What was the nature of that activity?

A. Activity on behalf of my clients not necessarily involving advice.

Q. Yes, Well, what was it?

A. Oh, appearance in cases before the Interstate Commerce Commission.

Q. Anything else?

A. Study. Accumulation of facts.

Q. What did you study and what facts did you accumulate?

A. Legal opinions, pending legislation.

Q. I still don't think you answered --

A. Statistical data.

29 Q. What is the statistical data and factual studies you made? What did they concern?

A. Taxes paid by railroads and tax matters and -- Will you read the question?

(Question read by reporter.)

A. Oh, I can't say in any detail. Tax matters and operating revenues and operating expenses. A great many things.

Q. That's all railroad data you have been referring to? Is that right?

A. And data by-- Tax matters and revenues by all forms of transportation.

Q. What did you do specifically with respect to truck transportation?

A. I couldn't answer that question. I --

Q. You have no recollection?

A. Oh, I have a recollection that's quite general in terms. I did what I could to know what was happening.

Q. Well, what was happening in what fields?

A. In all transportation.

Q. You made no special effort to keep abreast of what was happening in the truck transportation field?

A. Yes, I made an effort to keep abreast of what was happening in the truck transportation.

Q. And when you say what was happening, you refer to what kind of events?

30 A. Oh, the operations and revenues and the circumstances under which they operated, which the railroads operated, the relationship between the two.

Q. And when you say the relationship you include the competitive relationships?

A. Yes, I include that.

Q. And in the course of those studies did you make any written reports?

A. I may have. I don't remember. I'm sure there were things in writing.

Q. And do you recall making any written reports which related to truck-rail competition specifically?

MR. BALL: I instruct the witness not to answer this question as getting at the substance of communications between the witness as an attorney and his client, the material obviously being prepared in connection with matters involving the general course of the activities of this attorney for his client, including the representation in proceedings and oppositions in other matters between the State commissions and the Interstate Commerce Commission.

* * *

57 Q. And what was the nature of this highway department or activity that the law department carried on?

A. The nature of the law department is that which I've explained earlier today.

Q. Well, specifically, whatever the work was that then was done with respect to truck or highway transportation remained in the law department, did it, of AWR?

A. At what time do you refer?

Q. This is when AWR absorbed WARE.

A. I wouldn't say that. I'd say this: That the Law Department of the WARE was absorbed by the AWR. In general terms the same general functions were carried on since the absorption.

Q. That's what I was getting at -- whether there was any change in functions, specifically with reference to whatever activity was carried on in connection with highway transportation.

A. You understand there are changes from time to time in detail, and there's no set directive under which the law department functions. I can recall some changes.

* * *

65 Q. You filed, did you not, on behalf of yourself and the AWR a statement of purpose of the organization under the Federal Lobbying Act?

A. I might have. I think I did.

Q. I will show you this typewritten document here which we will mark for identification so we know what we are talking about.

(The document referred to above was marked Hays Exhibit No. 41 for identification.)

BY MR. WRIGHT:

Q. I'm just showing you this document marked Hays Exhibit 41 there and ask you if you recognize that as an accurate copy of the statement of purpose you filed under the Lobbying Act.

* * *

THE WITNESS: Will you read the question?

(Question read by reporter.)

66 THE WITNESS: The Exhibit 41 that you have just submitted to me is, as nearly as I can ascertain, not having made accurate comparison, an accurate statement, an accurate copy of a statement filed on behalf of the Western Association of Railway Executives prior to its absorption by the Association of Western Railways.

BY MR. WRIGHT:

Q. That statement was filed and prepared by you, was it not?

A. I think part of this was prepared by me.

Q. Well, who else do you think may have --

A. I just don't remember. It's quite some time ago. It was in 1948, wasn't it, or 1946?

Q. I think that's a 1948 statement, just preceding the take-over of WARE by AWR.

A. On the contrary, this was filed in 1946 I believe. 1948. Yes, first quarter of 1948.

* * *

67 Q. No, that was not my question. My question was whether that was an accurate statement of the purposes of WARE as of the time it was filed.

A. Well, it's a little broad. Its principal purpose is accurately stated in the first sentence of the third paragraph of the portion marked "Statement."

68 Q. Well, will you read that so we know what your're --

A. The sentence which reads, "The principal purpose of this Association is to deal with matters which are regional in character and which are of common concern to the railroads of the Western District."

Q. Now, the --

A. The next sentence to the effect that the Association afforded means for handling or supervising joint facilities could be clarified, could have been more accurately stated as to the specific point you make here.

Q. Well, how would you state it more accurately?

A. Well, it says here the adjustment of publication of rates. The WARE did not adjust or publish rates. It did afford then a means of supervising joint facilities of Western lines which did so.

Q. Now, those joint facilities were what?

A. The traffic bureaus and rate publication bureaus that you've just been discussing.

Q. Yes. Now, are there any other respects in which you think the statement should be amplified?

A. May I inquire here a minute of counsel, who has made some investigation--I'm not sure about some of these functions --

69 Q. Well, now, if counsel had something to do with the preparation of it, I suppose it might be helpful, but if-- A. Counsel did--

Q. If it's just your work, I think what we'd like to have is your own best interpretation of the statement there, unaided by him.

A. Well, the only reason I asked is whether there's been any change here-- Now, for instance, the weighing and inspection of freight. The WARE did afford means of supervising the Western Weighing and Inspection Bureau from a purely administrative standpoint --as to expenditures and efficiency in the administrative affairs. Whether that is or is not now a part of the AWR I can't say.

Q. Now, my first question was addressed entirely to the question of whether that was an accurate statement as of the time it was made with respect to the activities of WARE.

A. Well, it generally did afford means of supervising from an administrative standpoint those activities, although the Western Weighing and Inspection Bureau was always a separate and distinct entity.

* * *

74 Q. And as I understand your testimony as to the statement of purpose that appears there in 41, the statement that WARE supervised the functions that are named in the second sentence of this third paragraph, is a correct one?

A. The second sentence doesn't say that it did supervise. That is not correct.

* * *

Q. Now, just what did your statement refer to insofar as the rate activity was concerned?

A. That statement is sufficiently accurate for lobbying purposes but is not made and was not intended as a detailed statement of the precise character and nature of the activities of the Association.

75 Q. Yes. Well, now --

A. The Lobby Act, as you recall, required a statement of the principal purpose of the Association, and the second sentence is intended to modify the first sentence to indicate that the principal purpose of the Association was not to affect legislation. It was not principally a lobby organization.

Q. Yes, I understand that, and I want you to tell me if you can what specific rate activity you were referring to in that sentence.

A. Well, the rate activity referred to there was the -- that it afforded means of supervising, and that in a most limited extent, the joint facilities then existing with reference to the publication of rates and so on. The rate organizations were always separate and distinct from the WARE.

Q. What were those means of supervision you were referring to?

A. Perhaps means of supervision is a statement that is broader than in might be for the purposes for which you inquire. The only supervision that was exercised then by the AWR -- by the WARE -- and I think the same situation now prevails -- was the handling of the accounting and expense matters for those bureaus.

76 Q. What you were referring to there by means of supervision was the means for handling the control of the financing and expenditures of the rate bureaus?

A. Purely the administrative end.

Q. Yes. And those means, whatever they were, were taken over by AWR along with the other WARE functions, were they not?

A. No, I might qualify that further. At that time there was some concern by the WARE as to the supervision, the economy and general administrative expenses. With the adoption of the Bulwinkle Act there was definite care exercised to be sure that there was no supervision of any character exercised by the AWR

Q. Now, --

A. One of the distinct objectives was to have a clean-cut line of demarcation between the two of them because of the provisions of Section 5(a) of the Interstate Commerce Act.

* * *

80 Q. Well, I assume that would not apply to whatever lobbying activities there were. I suppose in so far as it involved federal legislation it was carried on in the District.

A. Not necessarily carried on in the District. The Lobby Act would not allow lobbying in the District.

Q. Well, you did from time to time carry on certain activities with respect to federal legislation, did you not? A. The WARE did, yes.

A. And that has also been true of the AWR, has it not? A. Some.

Q. And in that connection, you and other employees of the AWR made visits to the D. C., haven't you? A. Yes.

Q. And specifically, with reference to these visits that are listed in your interrogatory answers that were made by you -- and I am referring to the list that appears in your answer, or rather AWR's answer to Interrogatory 20 -- where the statement is made that "All of Mr. Hays' visits to the District of Columbia have been in connection with proceedings before the Interstate Commerce Commission, courts and other federal administrative agencies in connection with federal legislation or appearances or to attend meetings of the Association of American Railroads or one or more of its committees."

81 Now, by looking at the dates listed there, could you tell us which if any of those were visits in connection with federal legislation.

A. I could not.

Q. Do you know how many there were?

A. I know there were -- let's see. No, I cannot tell you which was which.

Q. And you don't have any idea whether there were five or ten or twenty of those visits that related to federal legislation.

A. There were a great many visits that pertained to federal legislation, a great many of those. Which ones, I cannot say.

Q. What federal legislation did they pertain to, do you recall?

A. Well, pretty much potential legislation or legislative policy, what bills had been introduced and whether we are for or against them and matters of that sort.

Q. Well, potential legislation relating to what matters?

A. Oh, I remember one in particular, a long series of hearings held by the House Committee on Public Works.

Q. That was with respect to what legislation?

A. With reference to potential federal appropriations for public highways in which extensive railway grade crossings and public policy

with reference thereto were involved.

Q. Anything else?

82 A. Oh, there are other things. I don't remember at the moment.

Q. You don't recall any other federal legislation you were concerned with, other than what you have just mentioned?

A. Well, at the minute, I do not. I could dig in and perhaps refresh my recollection.

Q. I notice this also refers to federal administrative agencies other than the ICC. What were those?

A. Oh, the Civil Aeronautics Board, Railroad Retirement Board.

Q. What were the matters before the Civil Aeronautics Board?

A. There was a general investigation of the non-sched airlines that went on for a matter of two or three years. That one in particular. The Post Office Department, policies as to mail. I don't remember.

Q. Well, were there any that involved highway transportation other than the ICC proceedings?

A. Oh, yes.

Q. Which were those?

A. The highway transportation, of course, was indirectly but importantly involved in highway legislation, federal appropriations.

83 Q. No, I am referring to these appearances before other federal administrative agencies. You referred to the non-sched proceedings before the CAB. That, I take it, had nothing to do with truckers.

A. Oh, no.

Q. Were there any other administrative agencies you appeared before in connection with matters which concerned trucking other than the ICC proceedings?

A. Well, there were some, I am quite sure, over that period of time. But at the moment I cannot recall them.

Q. You don't recall what theywere, what agencies were involved?

A. I don't know that I appeared in any of the other.

Q. Did that include visits to anyone in the Defense Department in connection with trucking? A. No.

Q. Of explosives? A. No.

Q. And your statement appears there that some of these visits were for the purpose of attending meetings of the Association of American Railroads or one or more of its committees. Can you identify those meetings?

A. There is the Law Committee principally, I would say.

Q. What committees of the Association of American Railroads were you a member of?

A. I am a member of the Law Committee.

Q. Any others?

84 A. I am an alternate member of the Committee on Competitive Transportation Research. There are special committees from time to time referring to special problems, generally legislative in character.

Q. Well, can you recall the names of any of the special committees you served on.

A. I don't recall offhand.

Q. Do you know how many of those meetings you attended of the Committee on Competitive Transportation Research?

A. No, I do not.

Q. And do you know what the subjects of those meetings were?

A. Oh, not in detail. In general it had to do with research as to all forms of transportation competitive with the railroads.

Q. Did any of them have specifically to do with trucking?

A. I am quite sure that some of them did, directly or indirectly.

Q. And do you remember what aspects of trucking you dealt with?

A. Oh, not in detail. There was some concern about the trip lease legislation and the matter of toll roads, what our policy should be as to toll roads, what our problems were in connection with it, matters of that character.

Q. Now, in connection with the trip lease legislation, did you give any testimony on behalf of the AAR or anyone else?

85 A. No, I did not.

Q. Do you recall submitting a written statement in that connection?

A. I do not. I am quite sure I did not.

Q. I want to be sure I understand what you mean by trip lease legislation. This was in connection with hearings on a bill to reverse or overcome an ICC decision with respect to trip leases?

A. Well, that is a fair statement of it. In precise terms it was to deprive the Commission of power to regulate either the term or the compensation under a lease.

Q. And you say you believe you did not submit a written statement in that connection.

A. Not myself. Now, I may have. There may have been a statement submitted with my name attached to it.

Q. You don't recall having anything to do with it?

A. No, I do not, not personally.

Q. You and the members of your staff do from time to time submit statement or testimony on behalf of the AAR -

A. No.

Q. You never have?

A. I think I submitted one statement once to the so-called House Committee on Public Works on behalf of the AAR as a member of a committee that was concerned with answers to some 14 points with reference to which the committee had sought public expression.

86 Q. Other than that, you don't believe you submitted any statements or testimony on behalf of the AAR?

A. I don't recall any. There might have been. Again I say there might have been some with my name next to it, but I don't recall.

Q. These trips that you and other members of the law depart-

ment made to Washington, those were all paid for by the AWR, were they?

A. Yes.

Q. And are there any that are listed here that --

A. You said paid for. The expense incurred in connection with them was paid by the AAR.

Q. Yes, those were all -- the statement is made here in the beginning of the interrogatory to the effect that the AWR does not admit that any of said visits were on "business of the AWR." All I wanted to be sure of was that there are no trips listed here which were of a personal nature. All the trips listed here are those which the AWR stood the expense of.

A. I cannot be positive of that, but I think --

Q. Well, at least so far as your trips are concerned, you think that is true.

A. As far as I am personally concerned, I think that is right.

87 Q. And I want to find out, if I can, if it is not AWR's business, just whose business it was that you were engaged in at the time you were making these trips.

A. Well, generally the business of individual member roads, in connection with cases before the ICC, for example.

Q. Now, you say the trips you made in connection with the proceedings before the ICC, those were all made on behalf of member railroads of the AWR who were parties to those proceedings. A. Yes.

Q. And that representation, however, was something which, as I understand it -- for which you were retained by the member road.

A. No. That is, you mean in the sense that you were paid special fees?

Q. Yes. A. No.

Q. That service was rendered to them, was it not, as a part of whatever service the member roads received from the AWR for their respective contributions, was it not?

A. Well, I don't know how you put it, but it was paid for by the AWR.

Q. But it was not specially paid for by them, was it?

A. I don't believe so. Certainly not the compensation.

* * *

120 MR. BALL: We have some corrections we might get out of the way.

On page 80, Mr. Hays' answer reads: "The Lobby Act would not allow lobbying in the District." The correct answer that Mr. Hays gave reads this way: "The Lobby Act is not alone lobbying in the District."

MR. WRIGHT: This is what line?

MR. BALL: In the fifth line.

MR. WRIGHT: The fifth line you want to change?

MR. BALL: "The Lobby Act is not alone lobbying in the District."

On page 86 in the sixth line: "There might have been some with my name next to it." The word was "annexed" rather than "next."

On the same page, the answer: "You said paid for. The expense incurred in connection with them was paid by the AAR." It should read "AWR." The context made that clear, and I'm sure that was said "AWR."

* * *

DEPOSITION OF AMOS M. MATHEWS

August 2, 1955

* * *

6 AMOS M. MATHEWS

was called as a witness and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT:

Q. Would you state your full name. A. Amos M. Mathews.

Q. And your occupation. A. Lawyer.

Q. Employed by whom?

A. Association of Western Railways.

Q. And you are a full-time employee of the Association?

A. That is correct.

Q. You do no work, legal or otherwise, for anyone else?

A. Not that amounts to anything, no.

Q. How long have you held that position?

A. About seven years.

Q. By whom were you employed before that?

A. By the Western Association of Railway Executives.

Q. In the same capacity? A. Yes.

Q. How long was that? A. Not quite 13 years.

7 Q. That is, you went to work there about 1935.

A. Yes, in the fall of 1935.

Q. And you have always assisted Mr. Hays, have you? You have assisted him in his work for those organizations?

A. Well, I have assisted him and I have also done work that he assigned to me that he didn't participate in.

Q. What is the general nature of the work you do for the Association?

A. Write briefs, handle some court litigation, represent railroads before administrative bodies, mostly the Interstate Commerce Commission,

and general legal work for the organization and for member railroads.

Q. Well, apart from the participation in judicial or administrative proceedings, what if anything have you had to do with the Association's activities that are concerned with truck transportation.

MR. BALL: Read the question.

(The reporter read the pending question.)

THE WITNESS: May I have that again.

(The reporter re-read the pending question)

THE WITNESS: I don't understand that question the way it is phrased.

BY MR. WRIGHT:

Q. All right. Let's see if we can simplify it for you. As I understand it, part of your duties are to engage in litigation which may involve contests between railroads and truckers, isn't that right?

A. The only litigation of that character that I can remember being in right at the moment, that is, that I can remember now, are suits in Federal courts which involve the setting aside, attempted setting aside of orders of the ICC.

Q. Well, do you do any legislative work? A. Yes.

Q. And what does that consist of?

A. Well, I have had a part in the presentation before committees of Congress in respect to the so-called trip leasing bill.

Q. You gave testimony in that connection.

A. Before the House committee.

Q. And on whose behalf did you present that testimony?

A. The Association of American Railroads.

Q. And were your expenses in that connection paid by the AWR or the AAR? A. By the AWR.

Q. And the legal work that you do for the AWR embraces, does it, the representation of some of the member roads in these various proceedings, ICC proceedings? A. That is correct.

Q. But as I understand it, you, like Mr. Hays, receive no compensation from the member roads. A. Not directly, no.

Q. All you receive is the salary you get from the AWR, is that right?

A. Yes, sir.

Q. And the AWR is in turn compensated by the member roads out of their contributions to the general expenses of the AWR. A. Yes.

Q. No special assessments are made for legal work rendered by you. A. No.

Q. Do you have any thing to do with the Western Traffic Association? A. No.

Q. Did you participate with Mr. Hays in the original proceedings there for approval of the Association under the Reed-Bullwinkle Act?

A. Yes, as an attorney, yes.

Q. Other than that, though, you have had no connection with it.

A. No.

Q. Do you do any rate work at all? A. No.

Q. None of the proceedings you handle involve rates?

A. No, never.

Q. Do you know who does handle whatever rate litigation your member roads are involved in?

A. All I know about it is that I have observed in some of the rate cases attorneys for the various roads handling that. I never have. I have never participated in rate matters at all.

Q. Now, what if anything have you done for the Association in connection with the problem of competitive truck transportation?

MR. BALL: Read that.

(The reporter read the pending question.)

THE WITNESS: Well, I have appeared as counsel or attorney for railroads in ICC proceedings, and, as I have said, in a number of court cases involving the validity of ICC orders and I have written briefs on various sub-

jects, but I just cannot remember any particular one right offhand. That covers it in general.

BY MR. WRIGHT:

Q. What if any connection have you had with the publicity activities of the Association? A. None.

Q. You work with the public relations department, do you not, in connection with these hearings you participate in. A. No.

Q. You don't supply them with information that they release about those proceedings? A. I never have, no.

11 Q. Well, you are aware of the fact that the public relations department of the AWR does to some extent publicize these proceedings in which you are engaged.

A. Well, I have never known of any particular proceeding -- are you talking about proceedings before the ICC?

Q. Yes.

A. I have never known them to issue any publicity in connection with any ICC matter in which I was engaged, that is, in the trial of the case.

Q. Now, isn't it a fact that representatives of that department were present during a very large part of these proceedings involving Riss and Company that you and Mr. Hays were engaged in.

A. Well, I have been told they were present, but I was not.

Q. Well, didn't you ever observe the members of the public relations department present while you were present?

A. No. But I didn't participate in any of the hearings of the Sub 84 or associated cases during the active trial stage.

Q. By the active trial stage you are referring to the presentation of evidence.

A. Before the Examiner, yes.

Q. Now, what was the stage at which you first participated.

12 A. In the writing of the briefs.

Q. And you participated also, did you not, in the final argument.

A. In the oral argument, that is right.

Q. And the members of the public relations department of AWR were also present at the final argument, were they not?

A. I believe they were, yes.

Q. And they covered that and actually publicized it, did they not?

A. I don't remember seeing any publicity about that myself, possibly because my name was not mentioned.

Q. Now --

A. Well, may I make a correction. I thought when you were referring to the presence of public relations department people you meant during the active trial stage of presentation of evidence before the Examiner, because I just was not there, so I would not know whether they were there or not.

Q. Now, with respect to legislative matters, I think you said you gave some testimony in support, or in opposition, I guess, to this trip lease legislation.

A. In opposition, yes.

* * *

DEPOSITION OF HAROLD M. SIMS

August 3, 1955

* * *

HAROLD M. SIMS

was called as a witness and, having been first duly sworn by the Notary Public, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT:

Q. Would you state your full name and address?

A. Harold M. Sims, Chicago, Illinois.

Q. And your occupation?

A. Director of Public Relations for the Association of Western Railways.

Q. How long have you had that position?

A. Since the beginning of the-- No, since the time that the Association of Western Railroads was merged with the predecessor organization.

Q. That was Western Association of Railway Executives?

A. That's correct.

Q. Prior to that time what was your occupation?

A. I was director of public relations for the Western Association of Railroad Executives.

Q. For how long a period?

A. Since May 1, 1944.

* * *

12 Q. Well, at the time you went with the WARE, your title was head of public relations?

A. Director of Public Relations.

Q. And what were your duties in that connection?

A. My duties were to deal with the public relations aspects of the various matters of interest and concern to the western railroads.

Q. Now, specifically what if anything did those duties embrace with respect to trucking?

A. Well, whatever were the public relations aspects of any particular matter that came up, our office endeavored to deal with them.

Q. Well, at that time was there any department of WARE that was concerned with competitive truck transportation?

A. By that time I presume that practically every department of the WARE had some interest in truck transportation.

Q. What were the aspects of truck transportation that you dealt with in the Public Relations Department?

A. Particularly with the public policies that were not consistent with public interest and were injurious to the railroads and tended to establish an unfair advantage to truck competition.

13 Q. Did your duties include any publicity activity in connection with legislation which would affect trucking?

* * *

THE WITNESS: I assume that in the course of my work some of the publicity that I handled would at least refer to legislation, either pending or proposed. I do not recall specifically, however, any incident at this moment.

* * *

30 Q. In response to the interrogatories that were served on the AWR by the plaintiff in this suit, the statement was made as to your activity in the District of Columbia, and I want to ask you if you can tell me just what if anything was done by you on the trips to the District of Columbia that were listed in the AWR answer as having been made by you.

* * *

THE WITNESS: Well, yes, I went to Washington to attend meetings of the Advisory Committee on Public Relations of the AAR, of which I am a member.

BY MR. WRIGHT:

Q. Are you a member of any other AAR committees?

A. Yes, I'm a member of the Subcommittee on Advertising, and I'm a member of a committee that has been following up the question of what to do relative to the public relations aspects of the Weeks -- or the

President's Cabinet Committee report.

Q. Now, were any of these meetings of the AAR committees that you attended there in Washington concerned with truck transportation?

31 MR. BALL: You refer, I take it, Mr. Wright, to the ones listed in the --

MR. WRIGHT: The ones you have listed here, yes.

THE WITNESS: Do not misunderstand. These were not indicated as all being AAR public relations and advertising meetings.

BY MR. WRIGHT:

Q. I understand that.

A. I do not know whether at any of those meetings that were held at Washington that I attended that trucking was discussed at all. I would be inclined to doubt that it was because the AAR has tended to stay off that particular subject.

Q. Now, what were the hearings before the Interstate Commerce Commission that you attended?

A. Whether these were the dates or not I cannot say, but I attended the reparations case hearings -- reparations cases hearings -- and I have attended other ICC hearings that I do not recall at the moment.

Q. Did you attend any of the Riss case hearings?

MR. BALL: You have reference again to Washington I take it, Mr. Wright?

MR. WRIGHT: Yes, at Washington.

32 THE WITNESS: I dropped in two or three times for a short period at the Riss case hearings, but I couldn't say I attended them in the sense of following them at all. I was in Washington on other business and just dropped over because I had some extra time.

* * *

44 Q. Now, do you make it a practice, Mr. Sims, in operating your office, to confine yourself to any particular territory when it comes to obtaining or circulating information regarding trucking?

A. Generally we confine ourselves to our own territory in the distribution of information, and that would apply naturally, I think, to the obtaining of information, because people in the western states would be interested in the information that pertained to the west. But we would cross any territory or go any place in the United States to get any information we wanted.

* * *

6 Now the motion to dismiss cannot be separately considered from the motion to quash service, because the original service was made upon the office in Washington of the Western Traffic Association, and it is argued in support of the venue over the association as against the motion to dismiss that the Western Traffic Association, another unincorporated association, was the agent of the Association of Western Railways, so that the common question exists as to those particular two motions.

* * *

7 Now the first problem, and I think that probably the determinative question in this case, both on the question of venue and on the question of the service, is whether the Western Traffic Association is in any sense of the word an agent of the Association of Western Railways.

* * *

12 THE COURT: I am not either. If the Court grants the motion to quash before we reach the motion to dismiss, then it leaves the defendant against whom the motion to quash has been sustained not in this court.

MR. BALL: No, but perhaps --

THE COURT: So if you haven't got service on the defendant, he isn't here; isn't that right?

13 MR. BALL: That is right.

THE COURT: Then how do I reach beyond that to sustain a motion to dismiss him? He isn't here. I can't dismiss him until he is here.

MR. BALL: I think the Court is entirely correct in that. We are reaching beyond the question of the service, however, to the point that whoever they serve in the District of Columbia, they still could not obtain jurisdiction. So we are anticipating some other situation where they might make service upon a managing officer in the District of Columbia.

THE COURT: How can you anticipate it? Has not the Court got to deal with what is before it at the time? And all that is before me, it seems to me, at least offhand, is a motion to quash. If I sustain it, that is the end of the matter for the time being.

* * *

MR. BALL: I think I am belaboring a point in which the Court is right. We are anticipating. I do not think that there is any question before the Court. If the Court decides that this was not a proper service, that there has been no service on it, I don't think there is anything else before the Court to argue.

THE COURT: It makes the other motion moot, doesn't it?

MR. BALL: I agree with the Court entirely.

THE COURT: Then, it seems to me, I should hear you and Mr. Wright, or whoever contends against you, on your first action on behalf of the Association of Western Railroads to quash service.

* * *

MR. BALL: Now the only fact upon which an argument is made that he is an agent is that on December 15, 1954, in connection with our original motion, we filed an affidavit by Mr. Daniel P. Loomis, who is chairman of the Association of Western Railroads, and among other facts he stated the Association of Western Railways is an unincorporated association, it has no written articles of association of any nature, that its principal personnel are as follows. Then he set forth his own name as chairman, the name of Mr. Blair as general manager, the name of Mr. Welsh as executive secretary, the name of Mr. Otterback as secretary, the name of Mr. Huckshold as auditor, and the name of Mr. W. R. Nugent as assistant auditor. Then underneath that he stated certain personnel of the law department and certain personnel of the public relations department, and in the list of the personnel of the public relations department he gave the name of Mr. H. M. Sims, director, and then the names of four assistants to the director of the public relations department. Among those four was Mr. Shoemaker.

Now we think that that very organization chart, while it refers to this long list of people, 17 people whose names were given --

* * *

It is our position, and we believe it is quite clearly established by the facts that I have stated, that the Western Traffic Association is an agent of the

Association of Western Railways, that it is under the control and supervision of the Association of Western Railways, that the Western Traffic Association is here in the District of Columbia beyond question, and that as an agent of the Association of Western Railways, service upon it, namely, upon its assistant to the chairman as an agent of the Association of Western Railways, is quite proper.

* * *

38 MR. BALL: If the Court please, let me advert a moment to the Shoemaker situation. I think that can be quickly disposed of. Rule 4(d)3 of the Federal Rules of Civil Procedure provide service of process on an unincorporated association may be made by serving "an officer, managing or general agent or any other agent authorized by appointment or by law to receive service of process."

Our position here is that they have got to contend that Mr. Shoemaker is a managing or general agent, and that Mr. Shoemaker, who is an assistant to a department head, is in no sense a managing or general agent.

THE COURT: I don't think you have to belabor that point. I am

39 satisfied from what I have heard, on the basis of facts, which apparently at least are not disputed, that Shoemaker was not an agent within the meaning of the law, and I will quash service as to him.

MR. BALL: Now the question remains as to this relationship of the Western Traffic Association to the Association of Western Railroads. I am sure that the Court appreciates that the Western Traffic Association is not itself a party defendant in this lawsuit.

* * *

54 There is one particular matter left that I would like to comment on, and that is this language in the lobbying reports from which an inference is drawn. A predecessor organization of the AWR, which was --

THE COURT: AWR?

MR. BALL: A predecessor organization of the AWR--one of them was the Western Association of Railway Executives. On behalf of that organization a lobbying report was filed, stating a long list of purposes of that association. They were filed for purposes of complying with the Lobbying Act provisions, and there was some statement that the WARE had some undefined means of handling and supervising joint facilities of western lines in the adjustment and publication

of rates and related matters. Now that language was used prior to the organization of the Western Traffic Association. In the reports that have been filed by the AWR subsequent to the organization of the Western Traffic Association, that language has not been repeated, neither have the purposes been restated, but reference has been simply made to previous statements.

Now the most that could be drawn is that there is a representation that the AWR has something to do with the adjustment and publication of rates
55 and related matters. However, the record is completely silent and, in fact, positively negatives the idea that since the organization of the Western Traffic Association, the Association of Western Railroads, has had anything to do with the adjustment or promulgation of any joint rates, it would be an extremely foolish thing for the association to take any action of that kind today, because there is a particular means by which that action can be taken freely through the Western Traffic Association and immunized from any attack under the anti-trust laws for joint action. There is a negativing of the facts on that specifically in the record.

They took the deposition of Mr. Hays, the general counsel of the Association of Western Railways, and on Page 5 of the last of our memoranda, which is the one numbered 8 in the files there, we set forth the excerpts of the deposition of Mr. Hays. He simply points out that as far as the present is concerned, that particular statement in the lobbying report is no longer applicable. There is today no rate-making function performed by the Association of Western Railroads. That has been subsumed entirely by a new organization created in response to a change in the law which was made to center and control all rate-making actions in an organization that had been approved and organized under the approval of the Interstate Commerce Commission in accordance with the act.

* * *

67 THE COURT: Gentlemen -- I don't care to hear from you further, sir -- from your arguments on the basis of the essential facts, which apparently are not in dispute, I am of the opinion that the Western Traffic Association is not the agent for such a purpose as we are now concerned with of the Association of Western Railways, and I grant the motion to quash. I granted the one as to

68 Shoemaker earlier. I now grant the one as to the Western Traffic Association, which leaves the motion to dismiss moot, I would say. Prepare an appropriate order.

* * *

ARGUMENT ON MOTION Filed January 13, 1958

* * *

106 But it should be remembered that if we do not prove the conspiracy that is now alleged in that complaint we would never, of course, even be able to offer evidence of this overt act any more than any other because the basic foundation for the cause of action is the conspiracy to injure Riss by taking them out of this explosives traffic and that issue, as I say, has got to be dealt with and dealt with by the jury, in any event, on the basis of evidence which involves these rate bureau activities.

* * *

* * *

169 Now, in connection with all of these prior motions, and this indicates the extent to which discovery can go on in this case, the plaintiff filed interrogatories on January 20, 1955, which were quite extensive. We had to have a hearing on those interrogatories. We had to have objections made and answers were then made after the interrogatories or the objections were ruled on.

* * *

208 Now, what are the facts as shown by the answers to interrogatories and the depositions taken about the business of the A. W. R. ? The Association of Western Railroads has its offices occupying considerable space in the City of Chicago and its staff is permanently housed in the City of Chicago. There are many of its activities that are carried on there of which nothing is ever done in the District of Columbia.

Now, for example, counsel says that you have got here two departments. There are two specially set up departments, as we pointed out. One is the law department and one is the public relations department but they are housed and both of their principal activities are carried on in the City of Chicago. But that is not all of the Association of Western Railroads by any means, and it makes it clear. For example, in the answers to the interrogatories, the answers that were filed here on July 29, 1955, we state considerably about the history of the A. W. R. and some description of the nature
209 of the activities. Among those activities, for example, as shown by Answer No. 4(f), is an extensive activity in the field of labor relations, the negotiations of the A. W. R. as the representative, for example, of the western railroads in gathering material about labor.

It handles a budget of many millions of dollars serving an accounting function representing railroad activities. All of those activities are carried on in the City of Chicago and have an entirely different character and very large and extensive and no essential relationship of any character to the work that is done, incidentally, here in the City of Washington, D. C.

Now, you have heard figures already submitted about the size of the association. You understand that to appear before the Interstate Commerce Commission does not necessarily imply coming to Washington. For example, these very extensive hearings involving the Riss case occurred in the City of Chicago, Illinois.

* * *

221 Now, the total man days of it all spent in the District of Columbia primarily on the matters of relations with Government agencies, thus total less than four per cent of the time of the seventeen principal people during that period of time. You can imagine what an infinitesimal total of time of the total employees of the A. W. R. were spent in the District of Columbia.

Now, I give that because that bears also on whether the business was entirely -- of the association was primarily this dealing with the Government. I think this throws some perspective on it.

Now, it is true that the answers to the interrogatories, because of the way in which the plaintiff framed the interrogatories, do not go into detail in the other activities of the association which have nothing to do with the District of Columbia. But there is enough in those answers to indicate
222 labor and such objects to show why it is that the principal work of the association is localized in Chicago.

* * *

ARGUMENT ON MOTION [Filed May 23, 1958]

* * *

113 THE COURT: Does anybody else want to make any argument?

During the month of January of this year the plaintiff argued before this Court a motion to amend and supplement their complaint by adding what

114 is now known as paragraph 18 to their complaint. After considerable argument by counsel on both sides, the Court from the bench announced its decision and permitted the plaintiff to supplement its complaint by adding paragraph 18, because it felt convinced that that was a proper thing to do. The argument advanced by the plaintiff as to why the Court should permit such an amendment was considered carefully by the Court before making its ruling.

Substantially, the same argument or suggestion or theory of the plaintiff's case is set forth on page 2 of plaintiff's memorandum in opposition to defendants' motions to suspend proceedings, and I quote a part of their statement. This statement reads as follows, referring, of course, to the ACTA case:

"The ACTA decision provides no basis for Commission determination of any issues in this case because Riss concedes that it cannot prevail unless it can establish that the joint rate cut relied upon in Paragraph 18 of the complaint as supplemented was made pursuant to a conspiracy to eliminate Riss's competition."

The Plaintiff further stated: "Leave to supplement the complaint was sought and obtained upon an explicit statement that the November 1955 rate cut was only the final overt act in the conspiracy to eliminate the plain-

115 tiff's competition alleged in the original complaint." Counsel for plaintiff cited transcript of argument, January 13, 1958, page 105.

* * *

14 ARGUMENT ON OBJECTIONS OF THE DEFENDANTS TO PLAINTIFF'S INTERROGATORIES [Filed 8/13/59]

MR. CLAPP: If your Honor please, my name is Newell Clapp, representing the Louisville & Nashville Railroad Company.

If Your Honor will permit me, I would like to make a suggestion on behalf of all the defendants: These interrogatories fall into separate categories. If it would be agreeable to Your Honor, I would like to argue my objection to interrogatory A with its subdivisions and then have the other defendants make whatever arguments they will see fit to make, followed by the plaintiff, then moving on to B which is a separate category and there are different problems involved. And then, disposing of B, at least by way of argument, moving on to C, D and E which affect only the counter-claimants.

THE COURT: Now, that is a very good suggestion but what I would like to do is this: I would like to hear all the arguments with respect to subsection A. I would like to decide that matter today after the arguments have been presented

15 by both sides, if I can. Then we will proceed to the next B, C, D and so forth, and try to dispose of as many as we can.

Now, I will hear all the arguments on subsection A.

* * *

16 Now, we have objected on two grounds: one, irrelevant altogether and, two, and very importantly, the tremendous burden it would be to us to answer those interrogatories which we can answer after a great deal of time and effort.

* * *

17 As to irrelevant, I would like to refresh the recollection of all of us to the fact that basically this lawsuit is a charge by the plaintiff that the defendants engaged in a concerted effort to put Riss out of business. Their original allegations, broadly speaking, were that we engaged in a campaign of defamation directed against Riss and for the purpose of putting Riss out of business. Then by supplement it was alleged that having failed in the original overt acts, we engaged in another overt act, namely, the reduction of rates

in October of 1955 and subsequent to that time, but it was pursuant to the original conspiracy.

Now, I have had a great deal of difficulty in my own thinking to find out what relevancy this very detailed breakdown has to plaintiff's case or to any defense that any defendants have.

* * *

MR. BRIDGEMAN: My name is Lester Bridgeman.

I would prefer to draw Your Honor's attention at this time to the question of burden rather than relevancy.

THE COURT: I am not going to pass on the relevency, because if this information can be gotten some other way, it may become relevant. I don't know. That can be decided later.

* * *

What is your contention that it would not be too burdensom or oppressive on the part of the defendants?

MR. BRIDGEMAN: I think I can answer that this way, Your Honor: We asked the question on the assumption that in the ordinary course of the defendants' business they would compile this sort of information.

For example, in response to our supplemental paragraph 18 of the complaint, many I think, if not all of the defendants said they had made these rate cuts on the basis of their business judgment. We assumed there was some rational statistical data for the --

THE COURT: You mean that they had compiled this data?

MR. BRIDGEMAN: Yes. Now, we certainly agree if it is going to take two years and hundreds of thousands of dollars to compile the information, of course, it is burdensome. We have no desire to make the defendants go to work for us; we just want them to pay us.

I think all we are interested in is knowing what they have. If they don't have it, they don't have it to give to us. I think that is clear. I think it is clear to Mr. Clapp; he will recognize that. We are not asking them to do any work or produce any information that they have not compiled.

Now, we believe that we are certainly entitled to the best evidence that they have of the volume of explosives transportation, of the revenue from explosives transportation. Certainly, we feel if it has been compiled by them, we are entitled to whatever rate information they have.

THE COURT: If they have compiled it.

MR. BRIDGEMAN: Yes, sir.

THE COURT: If they have it available.

MR. BRIDGEMAN: With this limitation -- We certainly feel that whatever defensive material the defendants may intend to produce at trial, we are entitled to know about. All we want is the best evidence they have in the form that they intend to use it. If they do not intend to use any such information, which is doubtful -- at least we want it in whatever form they have compiled this information for their own business purposes of this kind.

* * *

23 MR. CLAPP: If Your Honor please, I speak for L & N: We have none of this material available, as the affidavit makes clear. We would have to go into a tremendously detailed search and we have no intention of using any such kind of information in our defense.

* * *

24 THE COURT: Let me ask you, Mr. Bridgeman, is the purpose of requiring this information in connection with that part of your case that has to do with damages?

MR. BRIDGEMAN: It has to do with what we have described in our memorandum on damages as proof of injury.

THE COURT: Proof of injury.

MR. BRIDGEMAN: Yes, sir.

THE COURT: Now, are you willing to accept the statement made by Mr. Clapp about the problem of burdensome?

MR. BRIDGEMAN: Well, Your Honor, I think the difficulty is that Mr. Clapp is arguing to a position that we have specifically abandoned. I am not suggesting, after having examined the great flood of affidavits we have

received recounting the thousands of dollars and the hundreds of thousands of
25 hours that it may take to produce this material, we are not arguing that we are entitled specifically to each response to each particular interrogatory as we originally asked it. I am now attempting to determine what information respecting tonnage and revenue of government explosives these defendants do have.

* * *

26 THE COURT: Suppose the plaintiff wants to proceed by way of discovery and look at those records. Could those records be made available to them?

MR. CLAPP: If they move under Rule 34 and the Court directs that they be made available, of course, the defendants will have to comply. But I assure you it is a tremendous job for anybody. The records are just enormous.

* * *

29 MR. CLAPP: One qualification, Your Honor, if I may interject--We have got the information but it involves looking at two and a half or two and three-quarters million documents to find out.

THE COURT: I am not going to require the defendants to do that. They are going to get the same ruling that I made in so far as the ruling I made in behalf of the plaintiff.

Do you dispute anything in the affidavits that were filed? Do you say they don't contain accurate information?

MR. BRIDGEMAN: We are in no position to dispute them, Your Honor. The situation from our viewpoint is simply this: We filed the interrogatories on the assumption that they did have the information. We find now that they say they don't. We have got to accept that. We are interested in knowing what they do have. We would like to have it.

THE COURT: If they have the information available and can produce it, then that is one thing. I think you are entitled to it. But, if they have to
30 do a tremendous amount of work as disclosed by these affidavits,

I don't think you are entitled to it.

MR. BRIDGEMAN: Well, I think that's right, Your Honor. We certainly don't intend by any suggestion to challenge your prior ruling which is reported in 23 Federal Rules Decisions; we are simply suggesting that now that we know the burden they claim this would be, we are trying to discover some other method of attaining whatever information we can.

* * *

MR. CLAPP: The only thing we have is what we set forth in our affidavit, Your Honor, with two additional comments: My understanding is that that can be broken down into years; two, I would assume -- I have not asked -- I would assume that we could get an estimate by some qualified person in the organization as to what part, if any, of this traffic is private as contrasted to government. Beyond that, we would not be able to go.

THE COURT: All right. You have heard Mr. Clapp's statement now. That is as far as they can go without doing a lot of work. Now, would you want that information?

31 MR. BRIDGEMAN: Yes, sir. If that is the best information they have compiled, we would like to have it.

THE COURT: Suppose you do that, Mr. Clapp. How many days would you need to supply that?

* * *

THE COURT: ***

Do any of the other defendants, through their counsel, have any information of the same nature disclosed by Mr. Clapp, anything that is available and can be furnished?

MR. FLYNN: Your Honor, we all have the material that is in the national reports to the ICC.

THE COURT: I think the plaintiff has got that too or can get it.

MR. FLYNN: Well, I think that's what Mr. Clapp was telling him in addition to estimating how much is government and commercial -- I am sure we can do that.

32 THE COURT: Can you do that?

MR. FLYNN: I have no doubt about that. If nothing else, the military -- I have no doubt about that.

THE COURT: All right. Do you want that information?

MR. BRIDGEMAN: Yes, Your Honor, from any defendant if that is all they have.

THE COURT: All right.

MR. FLYNN: I have no information, nothing in my affidavits or discussions to indicate that there is anything else that has been compiled.

* * *

34 MR. BALL: If I may ride my hobby horse, if the Court please, I think that as this material comes up -- this is very appropriate material for stipulating the schedules in the pretrial. I understand what we will do, from the West, as this is agreed upon and supplied, we will put it into such form as it can be introduced.

THE COURT: Very well. I suppose you will have to be satisfied with that, Mr. Bridgeman?

MR. BRIDGEMAN: Yes, Your Honor.

THE COURT: All right. For the same reasons the Court gave in the case of Riss & Company against Association of American Railroads, et al., reported in Volume 24, Federal Rules Decisions, page 211, the Court will grant the objections made by the defendants to all section A, with the exception of the voluntary nature of the disclosure that will be made.

* * *

57 THE COURT: I think I indicated this the last time we were here: as to the alleged anti-trust violations, the claims are the defendants against
58 the plaintiff. The plaintiff is entitled to the same detailed information in the pretrial statement, setting forth in detail what the defendants expect to prove, and in sufficient time so that they may be prepared to meet the allegations at trial.

MR. BALL: We recognize we have that obligation.

THE COURT: You realize that. I am sure that will be done from what I have seen already to this stage.

All right. Now, do you have any time limit on that that you would like to set?

MR. BRIDGEMAN: Well, naturally, we would like it in time, Your Honor, so we can be adequately prepared by January 5th. Of course, we cannot dictate to Mr. Ball how long it should take. I would like to have an estimate.

MR. FLYNN: May I say something, Your Honor?

THE COURT: Yes, Mr. Flynn.

MR. FLYNN: The last time we were here, we talked about the plaintiff's documents that we had received and the process that was going on with respect to those. It's necessary to review those reports before we can do this, and that is really the delaying factor.

I understand from the people who are busily typing them up that they almost have one set.

THE COURT: Can you give me an estimate of how long it might

59 be before you have this statement prepared?

MR. FLYNN: I can't because I am not close enough to that work directly to know exactly where it stands. It is being handled by someone else in our office.

THE COURT: Mr. Ball, do you know?

MR. BALL: In general, the problem that arises is this: In this mass of documents, you have a good deal of joint rate activity of the plaintiff. We have got to compile this and it will be probably another month before document -- the compilation itself is done. Then it has got to go through a sifting and analyzing process before we can come up with a statement.

The point I am making here is that it is not being put aside; it is in process.

THE COURT: I think they ought to know some time before they actually get into trial --

MR. BALL: Very definitely. That is what --

THE COURT: They have got to know your theory before the trial date. Now, you are probably going to make an opening statement, aren't you? I don't know, but I imagine so.

* * *

PRELIMINARY INSTRUCTIONS TO THE JURY

BY THE COURT:

* * *

23 The plaintiff alleges also that the defendants engaged in certain types of activities as part of this alleged conspiracy, among which activities allegedly were the following:

One, plaintiff claims that the defendants solicited, directly and indirectly, through the use of so-called front organizations, state officials to take action to bring about a revocation and cancellation of plaintiff's authority from the Interstate Commerce Commission to transport porperty in interstate commerce;

Two, plaintiff further states that the defendants solicited, directly, directly and indirectly, through the use of so-called front organizations, state, county, city, and town officials to pass laws and regulations which would result in truck operations being made impractical and economically unfeasible;

Three, plaintiff alleges that the defendants solicited state, county, city, and town officials to instritute special campaigns designed to harass, burden, and impede interstate transportation by Riss through the unusual enforcement of statutes, ordinances, and regulations against Riss;

Four, plaintiff also claims that the defendants abused the privi-

24 lege of intervention and participation in proceedings before the Interstate Commerce Commission and used these proceedings as a vehicle for conducting a campaign of defamation against the plaintiff; that the defendants induced certain independent organizations to intervene against the plaintiff in those proceedings, through the use of false and misleading statements and publicity concerning the plaintiff. Plaintiff further states that these false statements and publicity, which allegedly induced these organizations to intervene against the plaintiff, were made to them by agents of the defendants who did not reveal to these organizations their alleged intimate association with the defendants.

Five, plaintiff further claims that the defendants conducted a false and extensive publicity campaign against plaintiff.

Plaintiff alleges that these activities of the defendants have forced the plaintiff to spend large sums of money to counteract the alleged effect of the defendants' alleged conduct, and have resulted in impairment of plaintiff's operations; loss of profits to plaintiff, and damage to the good name and business reputation of the plaintiff.

* * *

34 Any concerted action by any combination of men or corporations to cause or which in fact does cause direct and undue restraint of competition of such commerce falls within the condemnation of the Act and is unlawful.

* * *

OPENING STATEMENT ON BEHALF OF PLAINTIFF

BY MR. LAYNE:

* * *

36 Now, neither Riss nor any other trucking company approaches in volume of business or financial resources the smallest of the railroad defendants here. Moreover, Riss had to compete with other motor carriers as well as the railroads for Government traffic. During the same period, the period of 1949 to 1954, and subsequently through 1957, the railroads did not try to take traffic from each other, even if their lines were parallel, and the result was that competition for the traffic, or the munitions traffic, the munitions traffic of the United States, was competition between the railroads as a group on one hand, and the individual trucking companies as a group -- not as a group, the individual trucking companies on the other, such as Riss. The railroads as a group, and Riss as a single individual competitor.

Now, as I have said, the railroads told the Government that they wanted 90 percent of the traffic, without offering any lower rates, and that was in 1950.

Now, our complaint against the railroads grows out of the fact that they were not satisfied to get the traffic on their ability to handle it better

than the truckers. Instead, the railroads as a group attempted to persuade the public and the Government agencies that the truckers should be barred by law from handling it, and regulations that would cripple them from handling it in
37 competition with railroads, without affecting their rate structure.
38 Now, the railroads tried, as I have told you in my capsule at the beginning of this, to persuade the Interstate Commerce Commission to take away Riss' legal authority to compete with them for this traffic. They also tried to persuade the State of Ohio to take similar action. They went into a number of key states and tried to get laws passed which would make it impossible for Riss and other ammunition truckers to carry truck loads of ammunition because they knew that if you could handle only one-sixth of a truck load, you have to spend as much to handle it as you would if you were handling a full truck load. You still have to pay the driver. You still have to drive that truck. You still have to have it on the highway, and it costs almost as much to transport it in that fashion as if you were transporting a full truck load. It was to make it economically unfeasible and unpracticable to handle it.

Now, bills to limit explosives carried in a truck to 5,000 pounds, which was one-sixth of a truck load, were introduced in the States of Colorado--a state in which Riss operates; Iowa, a state in which Riss operates; Kansas, a state in which Riss operates; Maryland, a state in which Riss operates; Minnesota, a state in which Riss did not operate; Nebraska, a state in which Riss operated; North Dakota, a state in which he did not; Oklahoma, a state in which he did; South Carolina, one in which he did not, and Wisconsin and certain other states.

39 But the interesting fact about the introduction of this legislation in these several states was if you put it on that map, if you take those states and block them out on the map to your right, you will find that if they were inactive they would have created a wall down to the center part of the country through which no transportation could take place.

Now, it is perfectly evident that if you can haul a full truck load up to that barrier and then have to only transport 5,000 pounds

across the barrier states and then all right on the rest of the line, the impact is that no matter what the other states have, you can only transport 5,000 pounds during the entire movement.

Now, the thing that we think is crystal clear or which we will submit to you is crystal clear is that up to this point they were trying to avoid at all costs was cutting their rates for the service. The railroads, however, did not succeed in getting any state legislation; they did not succeed in getting the Interstate Commerce Commission to eliminate Riss -- the expert body that they went to or that they wanted to go to that would take it out of the business.

* * *

42 Now, the defendants hoped by their defamatory public relations campaign handled by Byoir in the east and the public relations and law departments of the Association of Western Railroads in the west to discredit transportation of munitions by highway for the United States Government.

43 They said competition of the trucking companies would be eliminated; they wouldn't have to do what they finally had to do. If you could just get people so viciously hostile to trucks and if you could focus on the trucks because they were handling it, the railroads thought they could monopolize this business without the necessity of bringing down the rate.

* * *

58 Now, let me tell you about the military ammunitions and explosives: That rose in 1949 -- we have detailed figures on this -- It rose from $395,000 in 1949 to $11 million in 1953. That, of course was at the height of the Korean War. And with the end of the Korean War, there was as there should have been a sharp drop for all transportation companies transporting ammunition and explosives; they weren't blowing it up any more.

But in 1954, after the war, and in 1955; Riss & Company transported in 1954, $3,611,000 worth of explosives; in 1955, it was $3,601,000.

But then the rate cut -- In 1956, $1,493,000; in 1957, $326,000.

64 In short, we expect to show from the documentary evidence that the railroads intended to monopolize the government transportation business for themselves, without regard to their merits as competitors and that this was a collective effort in which they all cooperated.

Finally, in summary, the documents we have will show that they preferred to accomplish the result without having to use the drastic reduction in their own rates, which, of course, reduced their own profit, to exclude truckers from the business but that they were at all times prepared to use that weapon when and if it was clear that they could do so and had to do so.

And, as I have indicated to you, by 1955 all the other methods had failed to drive Riss out of the business and the defendants did resort to their slash on ammunition. But they took this step only after a four-year campaign through their lawyers, their public relations people and their rate and traffic men to drive Riss out of business by every other

65 means possible.

* * *

66 Now, all of the railroad defendants in this case had intervened in the Commission to oppose Riss in that proceeding.

You must understand we have no quarrel with the legality of that action by the railroads. They were perfectly entitled to come before the Commission, to present themselves and to give the merits of their case before the Commission as we were. We agree that they were, themselves, privileged to appear before the Commission and to put the merits of their case before that expert body.

* * *

73 You will hear evidence that during the course of the hearing on Riss' application before the Commission in 1951 and '52 to make permanent the authority that it had been doing for ten years; it had been transporting explosives for ten years, and in that hearing to make that permanent for the future the railroad lawyers, particularly Mr. Hays

and Mr. Wickes, began to discuss the question whether they might not use this state legislation, these five thousand pound bills, as a better technique than I.C.C. proceedings as a means of driving Riss out of the explosives business without cutting their rates.

The evidence will show that Mr. Wickes and Mr. Hays and Mr. Mathews, one of Mr. Hays' assistants in the Association of Western Railways legal department, drafted a model bill to be presented to the state legislature which would have limited, as I have explained to you, the transportation to about one-sixth of a truck load.

This bill was to be presented to the state legislature on the claim that it was a safety measure, and it was distributed in the west by Mr. Hays to railroad lawyers and other railroad representatives, and through the union brotherhood representatives and others throughout the western states during the sessions of the 1953 and 1955 state legislature.

* * *

74 But, in spite of their legislative campaign and the accompanying use of the defamatory publicity, they did not succeed in having any of the bills enacted in any state in the face of the opposition that I have indicated from the Department of Defense.

* * *

76 We shall show, in short, that the defamatory campaign of the railroads was, in effect, a campaign to discredit the Defense Department as well as the truckers, which resulted from the Defense Department's refusal to accede to their demand for ninety per cent of the traffic without regard to other consideration.

* * *

78 Since, in each case, the purpose of the legislation to eliminate ammunition trucking was exposed by testimony of the representatives of the Department of Defense, the state legislatures had no difficulty in spotting the selfish railroad interest in these bills, and none of them ever passed.

But the hearings on the bills themselves provided an excellent sounding board for the introduction of anti-truck propaganda such as the playing of a phono-
79 graph record which the railroads had made of an ammunition truck explosion, and the showing of a film, also made by them, which showed the progress of a Riss truck carrying ammunition -- had cameramen following Riss trucks around. The film was a piece of propaganda which Byoir and his associates did not regard as really good enough, from a technical standpoint, to use directly in the campaign, but which the railroads used themselves, or had used at this legislative hearing.

The proof of the ultimate weapon, the rate cut, will also be made through documentary evidence. This evidence will show that these cuts were made when the trucks reached a point when they were carrying about half of the government munitions traffic; that is, truckers in general, not just Riss. Truckers at large were carrying about half the traffic, and the railroads were carrying about half the traffic.

It further shows that the cuts were not made to meet the competition; they were not to come down to the level that the trucks had established, but were intended to capture for the railroads the monopoly position that they had been unable to get the public authorities through all the business before the Commission, all this publicity -- they were unable to get everybody to hand it to them on a silver platter, so they had to reduce their rate.

* * *

OPENING STATEMENT ON BEHALF OF THE WESTERN DEFENDANTS

BY MR. BALL:

* * *

171 But some of the defendants here did go to the Public Utilities Commission in Ohio and said, like good citizens should, "Do you know what this man Riss is doing on your highways?" And they said they did. And the Public Utilities Commission of Ohio, responsible, efficient Commission having the public welfare at heart, on their own volition then went to the Interstate Commerce Commission and said, "We have had nobody like

Mr. Riss. Will you please cancel his authority? He is a hazard to the citizens of Ohio".

* * *

205 THE COURT: Is everyone ready to proceed now?

All right. Now, let the record show the jury at the present time is in the jury room.

The Court at this time will make a brief statement. The Court listened with great interest to the comprehensive and enlightening statements made by counsel for the plaintiff and counsel for the Association of American Railroads and counsel for the Association of Western Railroads, of last Thursday.

The Court felt that these statements were of assistance both to the Court and to the jury in understanding this complex case. However, the Court noticed a tendency on the part of counsel for the defendants to comment in too large a degree on the law which counsel felt was applicable to the case.

The function of an opening statement is to advise the jury of the questions of fact involved and it is not an argument on the law or counsel's version of the law. The Court feels that the opening statements serve a very useful purpose and does not intend to restrict counsel in any way from making full and comprehensive opening statements, but the Court does feel that the opening statement is not a proper time for remarks concerning the opinion of any counsel as to the applicable law of the case.

The duty of instructing the jury as to the law of the case is for

206 the Court and it is the Court's responsibility.

For this reason, therefore, the Court requests that counsel making opening statements in the future restrict themselves to a discussion of the factual issues and what their evidence will show. In other words, the Court desires opening comments on the facts and not detailed and extended remarks concerning what the law of the case is or is not.

The First Amendment to the Constitution of the United States

reads in part as follows:

> "Congress shall make no law abridging the freedom of speech or of the press; or the right of the people to petition the Government for a redress of grievances."

Although the First Amendment to the Constitution reserves to the people the rights of free speech and petitioning the legislature, such rights are not absolute, and actions pursuant to them are not immunized if these actions are for an illegal purpose, that is, a purpose which is in itself a violation of the antitrust laws.

The Third Circuit Court of Appeals has held in the case of Noerr Motor Freight vs. ERPC that attempts to influence legislation of executive action in and of itself lawful, may violate the Sherman Act, if its motivation emanates from a conspiracy condemned by the Act.

And I am referring to the advance opinion at page 4, footnote 3.

207 The Court affirmed, that Court affirmed the finding of Judge Cleary and approved in effect his language in that opinion.

The Court will direct counsel's attention to the part of the opinion of Judge Cleary in 155 Fed. Supp. page 814, in which Judge Cleary stated as follows:

> "Let us look at the record in this case. The acts committed by the defendants in pursuance of their plan reveal that the defendants formed an illegal conspiracy for an illegal object, injury to the truckers' business and good will, and, if possible, the elimination of the truckers as competitors. By illegal means, that is, the destruction of the truckers' good will, they sought to obtain their illegal objective, by what they claimed were legal means, appeals to the legislature, and they also sought, they also sought to accomplish their illegal objective.
>
> "The defendants have strenuously contended

that all of their activities were geared to a legislative program and that none of their activities come within the orbit of activities proscribed by the Sherman and Clayton Antitrust Laws Act.

208 "It has been noted and the Court here restates that the entire campaign and its objectives did not constitute a mere appeal to the legislature, nor was it a large-scale lobbying campaign.

"True, one phase of the activities was of a legislative nature but a rather new approach to legislation, to say the least.

"The other phase and the more important one of the campaign was the one of vilification designed to destroy the good will of the long-haul trucking industry. The Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were not acting as the guardian of the public welfare, as they have so earnestly asserted.

"Even counsel for the defendants, at record 2853, had to admit that the defendants were not motivated by altruism.

"It is in a situation such as this that the power and force of group action comes into play, and the remarks of Mr. Justice Burton, Supra, become very pertinent.

"When such group action is reinforced, as it was in this case, by unlimited financial resources to accomplish its objectives may very well, and does in this case, present

209 a picture of activities proscribed by the antitrust statutes."

The Court is familiar with Noerr opinions and agrees with the principle of law as laid down by Judge Cleary and as affirmed by the majority

of the Third Circuit Court of Appeals and intends to follow that rule of law in this case. That is simple: That attempts to influence the legislature, if established by the evidence, are not immunized by the First Amendment, if the evidence also establishes that such attempts were for the purpose of accomplishing an illegal objective.

The Court also agrees with the principle of law established by the Court of Appeals for the District of Columbia Circuit as stated in the ACTA case and intends to follow that rule as it indicated in its opinion reported in 170 Fed. Supp.

In that opinion this Court stated as follows:

> "One further substantive legal question must be considered. Even though it should be found in the end that the practices as such have been validly immunized by Section 5(a) of the approved agreement, nevertheless, if they are part of an effort by railroads, in combination or conspiracy to eliminate the competition of air coach, rather than used merely to meet that competition, the practice would be removed
> 210 from the protection of Section 5(a)(9). We do not think that the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of Air Coach for the Section 22 transportation involved."

* * *

The defendants further object to the fact that this Court regards the majority opinion in the Third Circuit in the Noerr case as expressing the law of this case. We object to the law as set forth in the majority opinion in the Circuit Court of Appeals for all the reasons that are set forth in the dissenting opinion in that case.

BY MR. BALL:

We object also to the Court assuming that the law as stated by either the Court of Appeals or the District Court in the Noerr case constitutes in any sense the governing law of this case.

We object further to the implied assumption that there is sufficient similarity between the facts in this case, which has not yet been presented to this Court, and the facts which were presented to the Court in the Noerr

213 case, to make the statements of either the District Court or the Court of Appeals applicable to the circumstances and the facts to be presented in this case.

We object on the ground that to apply the Noerr case and the language of the Noerr case, which is so intertwined with the specific facts of that case, to the present case is to prejudge the issues which will be presented to this Court.

* * *

221 THE COURT: Let me stop you right there.

Your argument, of course, is contrary to the Third Circuit Court of Appeals, to the footnote.

MR. McGLOTHLIN: Yes, the footnote.

THE COURT: Either the footnote or the general reasoning of

222 the opinion.

* * *

230 THE COURT: Well, the Supreme Court raised the petition rule, writ of certiorari in the Noerr case, decided it, rather in your favor, when

he decided it according to your argument in the case.

Naturally, I will be bound by it. But I think that this Court has a right to follow the law in the Third Circuit. It doesn't have to agree with it. I don't have to follow it. But I think if it's applicable or if it might be applicable to this case, I have a right to apply that law.

* * *

OPENING STATEMENT ON BEHALF OF THE
DEFENDANT TRAFFIC EXECUTIVE ASSOCIATION - EASTERN RAILROADS

BY MR. GATES:

* * *

403 Now, rate bureaus concern themselves with passenger fares and freight rates. I am not going to talk at all about passenger fares. I am going to talk only about freight rates, but in order that I may bring this home a little more, you have all ridden trains, even though you haven't shipped goods or freight; but you know you get on your little ticket that you buy when you go from here to New York a little statement which says: Subject to tariff regulations, or subject to tariffs on file.

Now, those are the things that the rate bureaus concern themselves with, and they are filed with the Interstate Commerce Commission, and they become the law with respect to the transportation in which the carriers may engage.

I also want to mention at this point and make specific that the rate bureau, the T.E.A., the W.T.A., and the S.F.A., does not or do not make the rates. The rates are made by the individual railroads. The associations operate as a vehicle through which these rates are adopted and are made public, and I will discuss that as I proceed with this presentation a little more fully than I have at the moment.

* * *

OPENING STATEMENT ON BEHALF OF THE DEFENDANT
CARL BYOIR & ASSOCIATES, INC.

BY MR. PIERPOINT:

* * *

543 Now, from what Mr. Rhoades has told you about what our basic assignment was to the ICC, I think you will understand that this situation was rather substantially out of the main stream of our assignment, it was a special

kind of an assignment that was undertaken at the specific request of the people who were handling it down here. And it went on in a way through 1952 and 1953 but at all times it was an extremely minor part of what Byoir was doing for its client, an extremely minor part. And I think you will find as the evidence goes in that all during this time my client was saying to its client "We do not really understand what this is all about. We are happy to do it but we would like to have a policy. We would like to know why we are doing this." And I think you will find that they never got that explanation, because, as Mr. Rhoades told you, to E. R. P. C., many of E. R. P. C.'s members, this explosives thing was of very little interest indeed, and we kept trying to get a policy from our client and we never did get one.

544 Now let me give you an example: Mr. Layne mentioned something to you about these five-thousand-pound bills which were statutes put before state legislatures that were supposed to control the size, the amount of bombs you could run down the road on the highway.

There certainly was some conversation between the people at Byoir who were involved with this explosives thing, and some of the lawyers who were appearing in these ICC cases with respect to those bills. But Byoir kept saying, when they were asked about it, "Our business is publicity, not policy, and if you want to have us do anything in support of such legislation you are going to have to get our client to tell us to do it." And our client never did.

Now, Mr. Layne I think read off a list of the states where these bills had been introduced that he was upset about, and the only one that was in the territory that was covered by our employers was Maryland.

Now you have got to understand that when Mr. Rhoades was talking about legislation, Byoir never went into any state and supported any specific bill except on specific instructions from its client, and we never received any specific instructions to go into Maryland and do anything about any specific legislation in Maryland.

So I say to you that with respect to these five-thousand-pound bills we played no part.

545 Now I am not suggesting that there would have been anything wrong about it if we had. As Mr. Rhoades has indicated to you pretty clearly, that is what we were doing. I mean from time to time we worked like beavers on state legislation. But all I am saying is that on these five-thousand-pound

bills we never got any instructions from our client to do anything about them and we never did anything about them. So it is a pretty strange conspiracy.

* * *

729 OPENING STATEMENT ON BEHALF OF THE COUNTER-CLAIMANT PENNSYLVANIA RAILROAD AND OTHERS

MR. McGLOTHLIN: Ladies and gentlemen of the jury, yesterday I attempted to state the position of my client and some of the other defendants with respect to the claims made by the plaintiff. Today I want to talk at considerably less length about two other lawsuits that you are also being called upon to decide.

They are in what lawyers call counter-claims. This is simply a device so that if two people have disputes among themselves, if the first man says: You hurt me on these facts and I should get some money from you; then the other man who has a different dispute can at the same time say: While we try that, I am going to show that you hurt me in a different way and you owe me some money. Now, sometimes one of them wins; sometimes both of them win; sometimes neither of them win. But they are eseentially two different lawsuits.

* * *

754 Well, I have told you that while these price fixing agreements were going on, the amount of explosives carried by the railroads in general dropped precipitously. But, of course, the Pennsylvania Railroad can't ask you to award it damages because of what happened to the railroads generally. I have to show you what happened to the Pennsylvania Railroad, and how these illegal price fixing agreements damaged it, and that is what I propose to do. I will tell you, briefly, how I propose to do it so that when the evidence comes in some months from now you will understand why I put it in and what it is intended to show.

We have a list prepared from the records of Riss & Company of every movement of explosives by Riss & Company over the period we are talking about; that is, from '54 through '57.

We also have copies of a large number of the pieces of paper, so-called rate tenders, that indicate the rate upon which movements took place. When one of those rate tenders shows, or indicates, that the rate was illegally fixed by one of these agreements I have been talking about, we can then go to the record of the shipments that were made and establish how much moved at that unlawful rate.

That doesn't quite get the Pennsylvania any money yet, because
755 what we have to show is that if it hadn't been for the unlawful movements we would have carried the traffic.

Let's take, again, Washington to Chicago, and as I have told you in my example, the B & O and the Pennsylvania operate between those, and we will say there were ten truckers that operated between them. Suppose our two bits of evidence are that those ten truckers, by one of the means I have described to you, illegally fixed the rate of $1.90 and the rail rate was $1.95. Well, the four million pounds of explosives now go out all truck, because they have the lower rate.

But, if that rate was illegal because of one of these agreements, the whole movement was illegal, or so we contend. And, so, you now have four million pounds that would move to Chicago, from Washington to Chicago, on a legal rate. But what was the legal rate? That was the rail rate, $1.95. And under the Department of Defense policy there being, in my example, no lawful truck rate, all the shipment would have moved on the rails.

Under the Department of Defense policy, as I explained to you, since the Baltimore & Ohio and the Pennsylvania Railroad had the rate in, the amount would have been divided between them, so the Pennsylvania Railroad, according to the proof ew intend to show you, in this particular example, would have carried two million pounds from Washington to Chicago
756 at a rate of $1.95.

* * *

OPENING STATEMENT IN BEHALF OF RISS & COMPANY IN ANSWER TO COUNTERCLAIMS

BY MR. WRIGHT:

* * *

769 The distribution of remedies goes this way: the United States, of course, has primary responsibility for enforcement of the anti-trust laws, and does it in two ways: it may either bring a criminal case, in which case the normal penalty is a fine payable to the government; or, it may bring a civil suit, in which case the government gets what is known as an injunction which is intended to stop the violation and prevent its recurrence. But this private remedy is in the law to fill a gap because in no government suit is there ever any compensation given to private individuals or business men who may have been -- may have had their business injured by the violation, which is the subject of the suit. So, this remedy that is being asserted by both sides here, by the counterclaimants and by the Plaintiff, is one which is wholly predicated on injury to the party who is suing. If he doesn't prove anything more
770 than that the other side, somebody else, violated the law, his case is dismissed. The only way he can make a case is to show, not only that there was the violation of law that he alleges, before there is any liability attached in these suits for a violation, the Plaintiff, or counterclaimant, must show that the violation injured his business.

* * *

COUNTERCLAIMANTS' OBJECTIONS BY MR. BALL TO OPENING STATEMENT BY MR. WRIGHT

778 The objections are: First, that Mr. Wright misquotes and misstates the counterclaims by treating them as limited to a charge of monopolization, and treating them as if they were limited to a Section 2 of the Sherman Act charge alone. All of the counterclaims charging price fixing charge, in the first place, a conspiracy in restraint of trade, and by the means of price fixing. There is no need under those circumstances to support that charge with these elements of monopolization.

In the second place, Mr. Wright argues that proof of intent to injure by price fixing is necessary to a price-fixing charge, whereas these

counterclaims, in charging price fixing, do not depend upon an intent to monopolize or any other kind of an intent.

* * *

787 MR. McGLOTHLIN: No, I don't. There is a specific charge that one of the violations was to fix prices for such transportation. There is a specific holding by the case which Your Honor says he intends to follow that that is a violation per se, regardless of intent.

Now, I may quarrel with the Air Coach case; but Your Honor says he will follow it. If you are going to follow it, that is part of it that has to be followed.

THE COURT: You ask me, then, to charge them, if you find a

788 conspiracy to violate the Antitrust law, and particularly, if there was a price fixing, that in and of itself would be illegal.

MR. McGLOTHLIN: That is what the Air Coach case held.

THE COURT: And no intent is needed. You agree with that, don't you, Mr. Wright?

MR. WRIGHT: No, I do not. This argument was made by the Defendants very effectively in the Air Coach case, even though it was rejected by the Court.

My own view is that the Schine case correctly states the law when it says that a price-fixing conspiracy taken alone is not a basis for a violation -- that a price-fixing agreement, if it is to reduce prices, doesn't rise to the proportions of a violation unless the purpose of the reduction is to obtain a monopoly or some other illegal objective.

* * *

DIRECT EXAMINATION OF MR. RISS

* * *

891 BY MR. WRIGHT:

Q. And what is your relationship to the plaintiff here Riss & Company?

A. I am president and chairman of the board.

Q. And how long have you been chairman of the board, Mr. Riss?

A. Since the company was organized.

Q. You organized it?

A. Yes, I did.

Q. When was that?

892 A. In 1927.

Q. Where? A. Colorado Springs, Colorado.

Q. What did the Company do when it was organized? What did it consist of?

A. We were in the wholesale produce business.

* * *

911 Q. Now I want to call your attention to that plaintiff's exhibit 2 for identification which is a map described as showing your authority to transport ammunition and explosives both permanent and temporary, and I will ask you to indicate on that map, if you will, when and what kind of explosive authority was acquired.

Now, what does the first explosives authority you had show, where was that, what area?

A. Well, we had permanent authority under our Grandfather Rights to operate from Kansas City to all of these points to Colorado, and a couple of points, not the points from Omaha to Colorado, but from these points: Kansas City to Ellmo, all of Oklahoma and Texas down to Denison, Texas.

Not into Fort Worth and Dallas, but just to Denison. All these points.

Out to Amorillo, and so forth. Everything was given to us under

912 our original Grandfather Rights.

Q. That was under what, 1942 certificate, was that?

A. Yes, it became permanent in 1942. It was filed in 1935.

Q. Yes, it was, and the one you filed in 1935 was granted in 1942.

Now I see you pointed out some additional explosives rights there. When were those acquired? I think you referred to a part of some routes

that are shown on the map there of Texas that weren't part of your original Grandfather's Rights?

A. Well, we received rights from time to time from the Commission to haul explosives as a new installation of the government would be opened, maybe to some little town that we didn't have the rights to serve. We would have to apply to the Commission for authority to serve that point.

And we had many of those from time to time.

Q. Those you are referring to, those were temporary authorities? A. Yes.

Q. Before we get into the temporary authorities, I wanted to direct your attention, first, to the permanent authority.

Now, you acquired that permanent authority, as I understood your prior answer, in 1942?

913 A. Well, that is when it became permanent.

Q. Yes.

A. We were operating it from '35 until '42.

Q. Now, were there any changes on the map there as to that permanent authority to handle explosives, after 1942, that you described?

A. No, there were not.

Q. Now, do the red lines that are shown here from west of St. Louis and Chicago, on that plaintiff's exhibit 2 for identification, are those a correct representation of the permanent explosives routes you had during the period 1942 through 1957?

A. Yes sir, they are.

Q. And you still have those rights? A. Yes, we do.

Q. Now I think you started to refer to the acquisition of temporary rights to all explosives and ammunition, and I am calling your attention particularly to hauling ammunition or explosives for the United States Government.

When did you first ask for temporary authority with respect to such rights and where were the points that you asked to serve?

A. Well, sometime during the Second World War, right after

the Second World War started, we were requested by the government to haul some explosives, I recall, from points in Oklahoma to Kansas City, I believe points in Illinois and Oklahoma, to that general area. Between Oklahoma, Illinois, Kansas and Missouri.

914

Q. Now, some of those points were off your regular commodity routes, were they?

A. Yes, they were.

Q. And what did you do with reference to those points. You got temporary authority?

A. Well when the government requested us to handle the explosives we would have to apply to the Commission and it would be back by wire or telephone call from the government agency, and then the government would issue a temporary authority which was good for 180 days.

Q. And then was that authority renewed?

A. Yes, they were renewed every 180 days from time to time, and at the government agency's request.

Q. You are describing now what period?

A. Well, from the period of from 19 -- I would say during the first World War, from early '42 until -- well, until the end of the World War II, and then again during the Korean War. Prior to the Korean War and after the Korean War.

Q. Now, I want to first call your attention to this period 1942-46. I think you made some reference to the first World War. I gather what you are talking about here is only the second World War?

A. I meant the Second World War. I am sorry.

* * *

920

BY MR. WRIGHT:

Q. Now, when we adjourned last Thursday, Mr. Riss, I believe we were going over that map that is in front of you there, which has been marked for identification as Plaintiff's Exhibit No. 2.

Now, that, according to its title shows the authority to transport

ammunition and explosives held by Riss & Company during the period 1954 through 1957. I believe, in your testimony, then, you pointed out that the red line shown on the western half of the map indicates the territory where Riss then had and always has had, since sometime in 1942, permanent authority to transport ammunition and explosives; is that correct?

A. That is correct, sir.

Q. Then you indicated, I believe, that the green line shown on the eastern half of the map indicated the routes over which Riss had temporary authority to transport explosives during this period 1954 to 1957; is that correct? A. Yes.

Q. And you had that same temporary authority prior to, between the period 1942 through 1953, did you not, also?

A. Yes, sir, we did.

* * *

985 Q. You do have, you have had accidents, have you, involving these trucks carrying ammunition and explosives? A. Sixty-three million miles, yes, we have.

Q. And you have had accidents, have you, where these explosives trucks have collided with another vehicle?

A. Yes; there have been some.

Q. In any of those accidents where one of your explosive trucks collided with another vehicle was there any explosion of the cargo? A. No; never.

Q. Now, you have other kinds of accidents in which these trucks have encountered some immovable objects such as a railroad overpass?

A. Yes.

Q. And has there ever been such an accident in which an explosion followed the impact of the collision?

A. No; never had an explosion, of any kind.

986 BY MR. WRIGHT:

Q. You have also --

MR. BALL: Just a minute. What was that last phrase?

THE COURT: Suppose you read that, Mrs. Romig.

THE REPORTER (reading): "No, never had an explosion of any kind."

THE WITNESS: No, from a wreck of any kind.

MR. BALL: Or, or from a wreck.

THE WITNESS: From. Caused by a wreck.

BY MR. WRIGHT:

Q. Have you had any situation where these explosives trucks of yours have caught on fire? A. Yes, we have.

Q. What is the most common cause of fire in this business of carrying loads of explosives long distances?

A. Well, I wouldn't know what you mean by a "common cause". There are two or three causes of fires that happen most times.

Q. Could you tell us what they are?

A. Well, one of them is usually caused by a tire. As you know, we have tandem dual tires, and one of them can go flat and the driver not notice it for a while and as the tire turns around it creates a friction and catches on fire. That is one cause.

987 We have had one fire as I recall caused by an engine catching on fire.

Q. Now, what is the driver supposed to do when the truck carrying explosives catches fire?

A. Well, he is instructed of course to immediately take it to some place that is away from the public, as quickly as he can, and of course put out the fire if he can.

Q. Does he carry firefighting equipment with him on his truck?

A. Yes, he does.

Q. And does he try to put the fire out himself first?

A. Yes, of course, naturally. He would try to put the fire out himself if it is possible.

Q. Have you had any explosions of these ammunition and explosives

trucks resulting from fires of the kind you have just described? A. Yes, we have.

Q. And how many of those have you had? A. Two.

Q. And when was the first one? A. It was in 1949, I believe.

Q. Do you know where it was?

A. Yes, out in Kansas.

Q. Can you summarize, if you can -- you were not of course at the

988 scene of that explosion at the time I take it?

A. No, of course not.

Q. You did get a report on it? A. Yes.

Q. Could you summarize just briefly what the circumstances of that explosion were?

A. Well, two trucks were going west and one driver noticed that the tire was smoking on the truck ahead of him. He passed up to the driver, he got up even with the driver and signalled him to stop, and they stopped the truck and took the fire extinguishers out and tried to put out the tire that was causing the fire.

They were unable to do so, so they blocked the traffic and went back to a little town that was, oh, within five or six miles of the spot and tried to get the Fire Department to come out and help them, and for some reason or another they wouldn't come out; and meantime the sheriff did come out and the roads were blocked, and within about a couple hours after the tire caught on fire, why, it exploded, the load exploded. That is, part of it exploded. It was a load of shells.

Q. And what damage occurred when the load finally exploded?

A. There was no damage to anything except of course our equipment. And it blew a hole in the pavement.

989 Q. No one was killed or injured? A. No, no one was injured nor killed.

Q. Did it destroy the equipment, and made a hole in the pavement?

A. Yes.

Q. And do you recall what the amount of the damage was there, what

it cost to repair the pavement?

A. I think it was around two thousand dollars ($2,000).

Q. By the way, how do you handle the insurance coverage on those risks of that kind?

A. Well, of course we have to, with the Interstate Commerce Commission, have to be protected -- the public has to be protected. We, however, carry the first $50,000 on each and every load, and then over that is carried by the Lloyds of London.

Q. That is up to $50,000 on any one accident Riss and Company pays the full amount; is that right?

A. That is correct.

Q. If it is over that, then your insurance coverage applies? A. Yes.

Q. Did you make an investigation of that accident? A. Yes, we did.

Q. Did you find that any safety regulations had been violated?

990 A. No, there were none.

Q. And insofar as the protection of the public is concerned, Mr. Riss, which would you say was more important after an explosives truck catches fire, the skill and courage of the driver or the number of regulations that are passed or inspections that are passed?

THE COURT: I will sustain an objection to that question.

BY MR. WRIGHT:

Q. Now, you say there was another situation where you had a fire and the truck exploded? A. Yes.

Q. And when was that?

A. I believe that was in '53.

Q. And that was where? A. In Indiana.

Q. And you also got a report on that accident, did you?

A. Yes, we did.

Q. Can you tell us just briefly any substance of what happened there?

A. We were hauling -- there, again, we had two trucks hauling a

load of these detonating fuses.

Q. Excuse me, did I ask you or did you say what the cargo was involved in the Kansas accident?

A. That was some shells. And only part of those exploded.

991 Q. Go ahead, I am sorry I interrupted you.

A. These were fuses, and the motor caught on fire, and the boy was close to a field, so he pulled down the fence and rolled his truck over in the middle of the field.

The other boy blocked traffic on one side, and this boy blocked the traffic on the other side, and after the fire had burned for a time the load exploded.

Q. Now, those were both Riss drivers, were they?

A. They were owner-operators.

Q. So they were driving Riss trucks?

A. Oh yes, sure.

Q. What was the result of that explosion in terms of damage?

A. Well, there was a hole made in the field and one telephone wire I believe was blown down.

Q. Were there any deaths or personal injuries? A. None.

Q. Now, are these the only explosions that you have had in the course of this entire sixty-odd million miles that you have operated those trucks?

A. It is the only two that I can recall and I am very sure if there had been any more I would have heard about them and I have never heard of any but those two.

* * *

1015 MR. WRIGHT: This exhibit is offered at this time because it is the example of defamatory publicity created and circulated by these railroad defendants that was put in the complaint in this case in exemplary form.

This article contains in it all of the defamatory statements about this business that we are complaining of in this case.

* * *

1029 MR. GATES: Your Honor, the objections of the defendants to the introduction of Plaintiff's Exhibit No. 5, I believe, have been noted in the record.

THE COURT: Yes, sir. You may read it to the jury.

* * *

1036 Here are some of the things you can do.

"Urge your locally elected officials to appear in opposition to the truckers at the hearing now being held at the Interstate Commerce Commission, in Suite 1100, 22 West Madison Street, Chicago, Illinois."

And I will pause there to ask you, Mr. Riss, do you know whether or not Riss and Company was one of the applications which was being heard in that room at that time?

THE WITNESS: Riss and Company was having their application heard, the first applicant to be heard in that particular case.

MR. WRIGHT: Now, I am continuing to read in the same box.

"Insist that your local officials oppose the truckers' application. The rules of procedure of the ICC permit such appearances without filing a petition in intervention or other pleading. In other words, your local representative can say for you: 'Our town is opposed to running the risk of having a

1037 truck loaded with dangerous explosives use our streets.'

"Urge your local chamber of commerce, trade association, and civic club, and the like, to do the same thing.

"Be certain to support completely the action being taken by a number of the railroad brotherhoods protesting the extension of dangerous explosives hauling by the trucking companies.

"Enlist the support of your local parent-teachers groups. Either have them represented directly, or have

them insist that their state organizations be represented in Chicago.

"Speak up as citizens and demand that your state government (particularly the highway, police and safety department,) be represented at Chicago to protect you from the dangers involved in permitting widespread truck movements of dangerous explosives.

"Do anything else you can to inform others and enlist their support in one of your town's cause in fighting a great potential danger.

"Don't take a chance on being one, who in years to come, might have to confess to himself: 'I helped turn a mad dog loose on our main streets.'

1038 "It can happen in your town!"

And I call your attention to the picture up in the left-hand corner, which says: "This truck might have been loaded with dangerous explosives, but fortunately it was carrying cigarettes. The accident happened late at night in a heavily populated section of Washington, D.C."

* * *

1130 CROSS-EXAMINATION OF MR. RISS

BY MR. BALL:

Q. Now, Mr. Riss, when was it that Riss & Company was first incorporated? A. In 1927.

* * *

1137 Q. Now, does Riss & Company have any affiliated corporations?

A. No affiliated corporations; no.

Q. Well, isn't it true that Transport Manufacturing & Equipment Company is reported to the Interstate Commerce Commission as an affiliated corporation with Riss & Company?

A. Well, it may be called an affiliate corporation. It is not owned, any portion of Transport Manufacturing & Equipment Company is not

owned by Riss. I happen to own them both.

Q. Now, let us come to that. Who are the stockholders of Riss & Company?

A. The stockholders of Riss & Company are my three children and myself.

Q. That would be Richard R. Riss, Robert B. Riss, Richard R. Riss, Jr., and Louise Riss?

A. That is correct.

Q. Isn't it true that your grandchildren, from time to time, have had stock in Riss & Company?

A. Well, yes. I thought you meant major. I have from time to time given my grandchildren some stock, yes.

Q. But presently there is no stock in Riss & Company owned by anybody except members of the Riss family; is that correct?

A. With the exception of some voting stock -- I don't mean voting
1138 stock, I mean stock for a director, who has to have one share in order to be a director.

Q. Which is given to him at the time he becomes a director to qualify and taken back at the time he ceases to be a director?

A. That is correct.

* * *

1146 Q. You were preseident of this company, Riss & Company, from its incorporation until about 1945? A. Yes.

Q. As a matter of fact, today, you have all of the voting stock of Riss & Company in your own name, have you not?

A. I do have.

Q. The stock held by your two sons and your daughter and your grandchildren are not voting stock; is that correct?

A. They are not voting stock. They are equal in power in earnings but not in voting.

* * *

1190 Q. Your provider plan came into -- or the legality of your provider plan was submitted to the Interstate Commerce Commission; was it not?

A. By us, yes. I asked for a decision on the provider plan.

Q. And do you recall what, when the decision of the Commission came down in that case?

A. I believe it was a couple or three years later but I will have to get you the exact dates.

THE COURT: What page are you referring to?

MR. BALL: Page 2. June 10, 1948.

THE WITNESS: Yes, that was in '48.

1191 BY MR. BALL:

Q. June 10, 1948, was it not? That was a decision by a division of the Commission that Riss & Company was not operating as a common carrier by using the provider system; is that correct?

A. That was a decision of the Commission that stated they didn't think we had enough control over our employees as a common carrier and asked us to cease operating, or directed us to cease operating under that plan.

We submitted another plan to them they accepted and we continued to operate.

Q. As a matter of fact, the Commission held that you were not performing your common carrier duty in accordance with the law by operating through the provider system; is that correct?

A. Not exactly that way, but that was what the Commission inferred; that we were not operating according to their regulations and in the meantime we submitted this other plan. This was a decision we asked for. We wanted to be sure we were operating legally. They didn't think we were doing everything we should as a common carrier. We ceased that operation and went into another plan that was acceptable by the Commission.

Q. You stated a minute ago that you asked for this investigation.

I submit to you that the facts were these:

1192 That the propriety and lawfullness of the provider plan were questioned by representatives of the Interstate Commerce Bureau of Motor Carriers, but Riss continued, on the advice of its counsel, to continue operations under the old plan and it was not until sometime after the investigators of the Bureau of Motor Carriers had criticized the plan that you had asked for an investigation.

A. Mr. Ball, the investigators of the Interstate Commerce Commission, one would come in our Denver office and say, "This is a fine plan." Another one would come in the Chicago office and say, "We don't like this plan."

We got so tired of hearing different opinions that we asked the Interstate Commerce Commission here in Washington to investigate and tell us if our plan was legal or not.

Q. Mr. Riss, did you talk to any members of the Bureau of Motor Carriers? A. Did I/

Q. Yes.

A. Yes, I talked to people in the Bureau of Motor Carriers.

Q. About the provider plan. A. Yes.

Q. And the fact is, they told you in their opinion the plan was improper; didn't they? A. No.

Q. To whom did you talk?

1193 A. Well, I talked to Mr. Blanning. I don't say he said it was improper. Mr. Blanning was the person I talked to personally. And just before the decision came out he knew what the decision was going to be and he said, "Your plan we don't consider is legal."

I said, "What kind of plan shall we work under?"

We submitted a plan to him known as the division plan. It was accepted by Mr. Blanning as an official for the Interstate Commerce Commission. A couple or three months later they came around to see if we were operating under that procedure, found that we were, and everybody was happy.

Q. Now, Mr. Riss, do you recall when you asked for an investigation of the provider plan by the Commission?

A. When we did ask for it?

Q. Yes. A. It is a matter of record. I don't know if I have it here or not, but --

Q. Was it August 21st, 1944?

A. That we asked for it?

Q. Yes.

A. Yes, it was August 21st, 1944, that we --

Q. (Interposing.) And you --

THE COURT: Just a minute. Please let the witness finish and I will also ask the witness to wait until Mr. Ball finishes his question.

1194 MR. BALL: Will you finish your answer?

THE WITNESS: We asked for an investigation on August 21, 1944.

BY MR. BALL:

Q. And the fact is that prior to August 21, 1944, you knew, as a company, that the Bureau of Motor Carriers of the Interstate Commerce Commission had challenged the validity of your plan; didn't you?

A. I knew there were some of the inspectors, who had no authority, approved the plan and thought it was very fine; others did not.

Q. You did not talk to those inspectors; did you? A. Personally?

Q. Yes.

A. Yes. I heard from some of them.

Q. Can you name some of them who said this plan was proper?

A. That it was proper?

Q. Yes. A. I can't tell you exactly what their names were. You are talking about a long time ago, you know.

Q. Yes. Can you give me the names of those who said the plan was improper?

A. I think Mr. Jim Miller in Kansas City thought it was proper. He was a divisional man. He had charge of the whole division.

1195 Q. And that was a man you later employed.

A. I hired him twenty years later, yes; or after he left the Commission.

Q. The investigation started in 1944. That is, you requested in 1944? A. Yes.

Q. The decision of the Interstate Commerce Commission was June 10 of 1948. A. '48.

Q. When was it you changed over from the provider plan to a new plan?

A. July of 1948.

Q. Was that before you had Commission approval of the new plan?

A. No. The Commission had approved it.

Q. The Commission had approved the new plan when?

A. They made an investigation, I believe, in February or a short time after.

Q. Isn't it true your first proposal to change away from the provider plan was made by letter on July 30, 1948?

A. That's what I said; in '48.

Q. In fact, you had not yet made the change over at that time; had you?

A. Well, the Commission order gave you a certain length of time to change over. They don't tell you to do it over night. It is a big

1196 operation.

Q. Yes. I ask you when it was you made the change over, in fact?

A. We started at that time. We started at that time and I believe it was in February the date was fixed, and in March a hearing on the compliance with the provider order was held in Kansas City.

Q. It was not until February that you had completely changed over from the provider system to your so-called division system?

A. I wouldn't say it was February. We immediately started to change over. I don't know exactly how long it took to get completed. It is a lot of operation.

Q. It was February, 1949, that you completed your change-over? A. I believe that is correct.

* * *

1226 Q. You ceased to be President in 1945 and continued as Chairman of the Board from that time on until 1958, did you not, Mr. Riss?

A. It was approximately '57; I belive it was '57.

* * *

1227 Q. And in 1957 you became President once more, did you not?

A. Yes.

Q. And you still remained as Chairman of the Board? A. Yes.

Q. Which position you today hold?

A. I didn't hear you.

* * *

Q. Which position you today hold? A. Yes.

* * *

1282 Q. When did you create a government division, Mr. Riss?

A. I believe it was a short time after the Korean war started.

Q. Would that be in 1950? A. I think so.

Q. Or was it 1951 before you set up the division, do you recall? A. No, I can't tell you. It was around that time. I am not quite sure just when it was.

Q. And what was your government division?

A. Well, it was a division set up separately to handle all government business, munitions.

Q. But it was restricted to explosives business, was it not?

1283 A. No, it wasn't restricted to explosives business, but restricted to government business. Some of it was not explosives.

Q. Well, isn't it a matter of fact that your government business

other than the explosives was handled not by your government division but by your general commercial division?

A. No, that is not true. The fact of the matter is that some of the government division hauled some of the commercial freight on their backlogs.

Q. I am not talking about general commodities of others, but isn't it a fact that a substantial portion of the non-explosives business which Riss received from the Defense Department and other government agencies in that period of time was not handled by the government division?

A. No, I would not say that is true. I would say that there could have been some handled by our commercial division, but in most cases, all government business was handled by the government division in that period you are talking about.

Q. Well, on your books of account you kept a separate record of the business of the government division from the other division of your business, did you not?

A. We kept separate books of the government division. The business handled by the government division was kept in one set of books. The business handled by the commercial division was kept in another set of books.

1284 Q. Now, who was the head of your government division when it was first set up?

A. Mr. S. A. Johnson.

Q. And who succeeded him as head of the government division?

A. Mr. Larry Quinn.

Q. Now, Mr. Quinn was stationed where? A. Kansas City.

Q. And did Mr. Quinn and before him Mr. Johnson have charge of the solicitation of explosives business?

A. Well, yes. I wouldn't say have charge of the solicitation, because much of the solicitation was done, we only had one man that spent most of his time in solicitation, Mr. Romulo here. He did, however, solicit some other business, such as from the Post Office Department, etc. Most

of his tonnage was government division.

Q. And the business solicited from the Post Office Department was handled by the commercial division?

A. Yes. That happened to be post cards.

Q. And Mr. Romulo reported to Mr. Rhodebeck, did he not?

A. I believe he did on that eastern division, yes.

Q. And to whom did Mr. Rhodebeck report?

A. Mr. Rhodebeck reported to whoever was in charge of Riss and Company at the time. Mr. Rhodebeck was generally a commercial
1285 division person, even though he did solicit some government business.

Q. Now, Mr. Rhodebeck, in fact, reported to Mr. McGuire, did he not?

A. Well, at one time when Mr. McGuire was only in there a short time, Mr. Rhodebeck was there ahead of Mr. McGuire and after Mr. McGuire.

Q. When was Mr. Rhodebeck and Mr. McGuire there?

A. Oh, I can't tell you. He was with us on two or three different occasions since we have been in business. The last time I can't tell you when he started and when he left. I don't remember.

Q. His name was Mr. Kenneth McGuire?

A. This is right.

Q. And some time in the period of 1949 to 1953 he was a vice president of Riss and Company?

A. That is correct.

Q. And what were his duties at that time?

A. His duties were sales. He was in charge of sales all over the country.

Q. And during the time that he was vice president in charge of sales, Mr. Rhodebeck reported to him?

A. Yes. But the government division we did not consider he was -- he was regarded as working for the commercial division, Mr. McGuire.

1286 Q. And who was in charge of the commercial division?

A. Well, the president of the company and myself.

Q. Well, now, Mr. Robert B. Riss was the president at that time?

A. He was the president at that time.

Q. And what position did Mr. Dannevik hold in the period 1949 to 1953?

A. Mr. Dannevik was a vice president, legal. He was a lawyer, and assistant to R. B. Riss.

Q. Isn't it a fact that Mr. McGuire reported to Mr. Dannevik?

A. Well, that would be natural, I imagine, if R. B. Riss is busy, that he would, as his assistant, but both men had bigger titles than Mr. McGuire.

Q. Now, how long did you maintain a government division?

A. I think until possibly the latter part of '56. I am not sure exactly when we consolidated back with our commercial division.

Q. Now, to whom did Mr. Quinn report when he was head of the government division?

A. Well, he would naturally report to Mr. Dannevik, Mr. Riss, and myself. Most of his operations were direct with me.

Q. Did the government division have its other solicitors than Mr. Romulo?

1287 A. No one on a full-time basis, no.

Q. Did it have any dispatchers of its own?

A. Yes, it did.

Q. Where were those dispatchers located?

A. All over. The headquarters, of course, was Kansas City, but they were roaming dispatchers. They went from place to place where the installations were moving freight.

Q. During the year 1953, how many dispatchers did you have in the Government division?

A. I have no idea, but I imagine somewhere around thirty or forty.

Q. Were any of those permanently located anywhere?

A. Permanently?

Q. Yes.

A. I don't think so. Well, they were located for a period of time. For instance, we had one set of dispatchers in Baltimore. The general office, of course, was Kansas City, and I don't know if there was any permanent installations anywhere else. I don't think so. I think they moved around from place to place as the tonnage moved.

Q. Now, did you have drivers who were assigned particularly to the government division? A. Yes.

Q. Would drivers interchange between the government and the
1288 commercial division?

A. Well, seldom. They might have at times.

Q. Did the drivers in the government division use the regular Riss terminals?

A. Regular Riss terminals?

Q. Yes. A. Not as a rule, because if they had a load of explosives on, they couldn't park in a Riss terminal. We had other places for them to park. They might have come in the Riss terminal to get information or to use the telephone to get in one of our garages, but as far as parking there, no.

Q. In fact, those trucks would rarely report to a Riss terminal at any time?

A. Well, I wouldn't say the trucks would report. The dispatchers, for instance, if we had some loads near a place that the terminal managers knew that was a government movement, they would be in contact with those dispatchers and tell them they could load so many trucks back in the direction they were going. They worked together very closely.

Q. The same trucks and drivers, then, would be used to handle commercial business on the back haul?

A. It is according to what the deal was. If we had to get right back, didn't have time, chances are they didn't. If there was lots of trucks

on the run and there was no particular hurry, then they would load the trucks back in the general direction where the next load was coming from.

1289 Q. But the back haul of commercial commodities would be credited to the commercial division and not to the government division?

A. That is correct.

Q. Now, how many freight solicitors did you have in the year 1950, approximately, Mr. Riss?

A. Oh, I can't tell you any particular year. We had around two hundred, I think, along about that time, from around, I would say, from around '45 to '52 or '53. We had around two hundred.

Q. Now, those were solicitors for general commercial traffic?

A. Mostly, but some of them also solicited government business.

Q. Explosives business, Mr. Riss? A. Yes.

Q. At particular government installations, is that it?

A. It just happened to be a government installation or a routing place. For instance, I recall one time, Pittsburgh routed freight, the man closest to Pittsburgh would probably call on that office.

Q. What was the compensation basis of freight solicitors?

A. Salary.

Q. And no commission on the amount of business they had obtained?

1290 A. No.

Q. In your commercial division, the years 1949-1953, did you operate regular scheduled shipments?

A. No. We never have operated regular scheduled shipments as such. In the freight business, we don't have time to start or to time to get to any point. It is usually you leave a town after the freight is picked up and put on the road trucks and you get to your next point either the first morning or the second morning in time to make early morning deliveries. There is no such thing as an hourly basis or a time schedule.

Q. Now, when I asked before whether the solicitors were paid a salary or commission basis, I had reference, and I am sure you did in

in your answer, to the period 1949 to 1953?

A. Yes. We have had all kinds of different means of paying people over a period of years. I believe at that time most of the boys were on a salary basis plus expense accounts plus car allowances, and I think that was the general practice at that time and for a period ahead of that.

Q. Now, as a matter of fact, Mr. Riss, in the year 1953 the government division had become a very substantial part of your business?

A. Yes, it was.

Q. It was roughly what, forty percent of your total business?

1291 A. Well, I would say, yes, about that.

Q. You kept separate records, did you not, in your government division of what was ammunition and explosives revenue as distinct from any other revenue carried by that division?

A. I believe we kept records of the revenues and the expense, hauling expense or any other expense of the government division, charged them a certain portion of the general office expense from time to time. That was not a permanent record. That was just some records that were kept from time to time, and that went on for several months. I don't know how long.

1365 * * *

Q. Now, shortly after the Korean War began, many trucking companies not previously active in explosives trucking became interested in this business, did they not?

A. Yes, there were some more operating licenses granted.

Q. Well, there were quite a number of truckers that interested themselves in getting, at least, temporary authority, didn't they?

A. Well, I don't know what number. It would not be as many as there were common carriers, but there were several.

Q. Well, it was several score, wasn't it, in fact, Mr. Riss?

A. Well, I don't know. I have no idea, Mr. Ball, how many there were.

Q. In fact, you were so interested in your own business that you didn't pay too much attention to the other truckers getting into the explosives business; is that correct?

A. Oh, yes, I think we knew about them getting in the explosives business, but I don't just recall each and every one that got into it, or whether they hauled any merchandise.

We had lots of business at that time, not only explosives but other business, and I kept pretty busy.

Q. Now, before the hearings began in the Explosives case, your 1366 sub. 84, the application for permanent explosives authority, before those hearings began in September of '51, there were more than 50 other trucking companies that had filed applications for permanent explosives authority, had they not?

A. I believe that is the number, Mr. Ball. Of course, the record will speak for itself. I can't tell you exactly how many. It seems to me that it was around 50.

Q. And most of these companies were already engaged in the transportation of explosives for the government under temporary authority, were they not?

A. I do not know that.

Q. Now, you did know, of course, and I think I covered this before, that there was an understanding or work-out by the Interstate Commerce Commission that the evidence in your case would apply to the cases of these other applicants; is that correct?

A. Well, I know that there was some understanding that our case would be tried first, and they would use that evidence to prove, I believe, the necessity of truckers hauling explosives, but I didn't know all the particulars of it.

I am sure Mr. Moody will be able to answer that much better

than myself.

Q. Now, which of these other applicants for permanent explosives authority did you regard as your principal competitors for the explosives business, Mr. Riss?

1367 A. Well, I can't call them by name, all of them. Naturally, those that operated in our territory would be our competitors. A man operating in California, I would have very little interest in. There were several in our territory. I can't tell you all their names.

Q. Which were the principal ones in your territory, Mr. Riss?

A. Explosives haulers?

Q. Yes, explosives haulers.

A. Well, there was Watson Brothers. There was the Hayes Freight Lines; Padgett.

Q. Now, H-a-y-e-s, is that it?

A. Yes. I can't remember them all.

Q. What was that last one you named?

* * *

A. Baggett; that is correct. That is about as close as I come to names.

Q. Those you considered were your major competitors for explosives traffic, did you, the three that you named?

A. No, I would not say that they were major competitors, Mr.

1368 Ball. We didn't have many competitors when we come to actual service. We hauled over quite an area that other carriers did not haul over, and we didn't have a great deal of competition. Some short hauls, or maybe Hayes would be competitive on other hauls; maybe Watson would be competitive, but generally speaking, we didn't consider them big competitors.

Q. Now, Baggett hauled all over the country, did he not?

A. I don't know, towards the last, where his rights did go. At first, very little, but they kept expanding.

Q. Now, some of these explosives carriers would apply for permanent authority and ask for authority to operate in the same, over the same routes that you were asking for authority to operate in; isn't that correct?

A. Mr. Ball, I do not know. I don't know what they asked for. I just cannot tell you.

Q. You do not recall, do you, then, that in the Explosives case you intervened in opposition to the granting of permanent explosives authorities to a number of others of these 56 applicants?

A. I just can't tell you whether we intervened; I just don't know.

Q. You recall, do you not, that the American Trucking Associations appeared in the Explosives case to support the applications of yourself and other truckers?

A. They might have, but I say I don't know.

1369 Mr. Moody would be more able to answer those questions than I am.

Q. Now, the hearings in the Explosives case had begun, had they not, before the article in Ties Magazine appeared, that you referred to, the first day of your testimony?

A. I don't know that. It seems to me that they were published before, but it could be shortly after. That was quite a long hearing, you know. It lasted for several weeks, and it took that time to get ready.

Q. Now, I am going to ask you a few questions, Mr. Riss, to find out what you know about some of these other explosives applicants, some other companies in the trucking business.

The first one was Pacific Intermountain Express Company. Do you know this company? A. I do.

Q. Where does it have its headquarters, do you know?

A. California.

Q. That is the company that has PIE as its sign; isn't that correct?

A. That is correct.

Q. Do you know what territories it operates in?

A. Well, they operate from Chicago west to Denver, out into California, and the States in between California.

They were an interline connection with us. We handled a lot of explosives and other merchandise from, picked up somewhere in California,
1370 or Oregon, or somewhere in the west, and brought it to us in Denver or Chicago or St. Louis, and we took it on east.

Q. Now, during what period of time, did it interline with you on explosives? Do you recall that?

A. Oh, Mr. Ball, I can't tell you these exact dates, but for a long, long time. I just don't know the dates.

Q. Do you know whether they still interline with you?

A. Yes, they do.

Q. On both explosives and general commodities?

A. Yes; even though we are competitive somewhat.

Q. Well, to the extent that this line operates west of Denver, it is not competitive with your company; isn't that correct?

A. That is correct.

Q. And where is it competitive? On what routes is it competitive?

A. Betwen St. Louis, Kansas City, and Chicago and Denver.

Q. In other words, over the route from Chicago to Denver, from Chicago to Kansas City, and back; is that correct?

A. I don't believe they can serve from Chicago to Kansas City, but they can serve from St. Louis to Denver. They can serve from Kansas City to Denver, and from Chicago to Denver.

Q. And those would be the areas where this company is com-
1371 petitive?

A. Now, Mr. Ball, that is the main area. They may have other

points that they compete with us. I just don't know, but I know that there was at one time 80,000 truckers, and I cannot tell you where they all go. That, in my memory, are the main points that we competed.

Q. Do you regard them as a substantial competitor in this area?

A. Well, yes and no. They were competitors as far as business from Chicago was concerned, to Denver. They were competitors as far as business from St. Louis is concerned, but they were also a connection with us.

They had the most operating rights in the west, and we had the most operating rights in the east; and it was a very good arrangement for us to pick up frieght in the east and haul it to Denver and give it to PIE; or they pick up freight in the west and bring it to us; and we covered many points.

Q. Do you know whether it handled much explosives business competitive with yours?

A. I don't believe that they handle -- I don't recall that they handled any business that we could pick up and deliver.

I know that we handled a lot of explosives business with PIE. They might have handled some with another carrier, interlined with another carrier, but I do know that we hauled a lot of explosives with PIE.

1372 Q. Have you any idea how much equipment PIE operates, Mr. Riss?

A. Now, I do not know. At one time, they were, oh, I would say, they had 60 per cent as much as we did.

Q. That would be about 1952 or '53?

A. Well, I just don't remember the years, but they had a longer haul. A lot of their merchandise was moving from Chicago to the west. We had much more equipment; our hauls were shorter than theirs. Their volume was very good, but they just didn't have a much tonnage as we had.

Q. Do you know whether this company handles any heavy proportion of less than truckload shipments?

A. I do not know what their ratio is. I do know that they handle LTL freight, yes.

Q. Does this company, to your knowledge, own its own equipment?

1373 A. At various times they have changed. I don't know what they are doing at this time. I know at one time they were pretty heavy on owner-operators. I think, however, since they have been owned by the public that they pretty much own their own equipment.

Q. It is now owned by the public? A. Yes.

Q. And in that respect it is unlike your company which is still privately owned?

A. Well, yes, That is correct.

Q. Do you know whether this company has been engaged in any major litigation with its suppliers of equipment at any time?

A. Do I know if they have?

Q. Yes.

A. I don't know if they ever got to litigation. I know they had quite a few arguments with several of the suppliers of equipment for not having equipment delivered as purchased, yes. I recall one very large one.

Q. What was the company with which they had the controversy?

A. Fruehauf Trailer Company, one; Brown Trailer Company was another. Trailmobile Trailer Company was another.

Q. Now, has Pacific Intermountain Express Company increased

1374 its routes since 1949 to your knowledge?

A. I think in the last couple or three years that they have purchased some lines. One, I know, they handled gasoline, fuel haulers, and I believe they bought some connecting lines out on the West. They had not extended their rights east to my knowledge.

Q. You don't know of it having sold any of its rights in the last four or five years?

A. I do not know.

Q. Do you have knowledge whether Pacific Intermountain Express Company engages in any special type of transportation such as automobile carriage or tanker carriage or the like?

A. I do know they have the tanker carriage now. If they are

hauling automobiles, I do not know. I believe they have the rights but I am not sure about that either.

Q. Was it according to your recollection relying largely on owner-operators in the period of 1949 through '53?

A. I do not know.

Q. You don't know whether it is today or not?

A. I do not know.

Q. You know whether this company leases equipment to other truckers?

A. Oh, I am sure they do. They have to us.

Q. They have leased what? Trailers?

A. Trailers. I believe in the early days, before it became against
1375 the ICC regulations, we used to interchange trailers and tractors.

Q. That was not on interline arrangements but just an interchange of equipment?

A. No, that was on interline arrangements.

Q. Does it lease equipment other than on interline arrangements?

A. I don't know about their business. I have a hard time running my own.

Q. You know whether it handles any particular amount of commodities such as household goods?

A. I do not know.

Q. You know the management of this company?

A. Not any more. It has changed so much recently, I don't know but very few of the boys any more.

Q. Now, another one of the applicants for permanent trucking authority was Garford Trucking, Incorporated. You know anything about this company?

A. Garford?

Q. Yes. G-a-r-f-o-r-d.

A. Never heard of them.

Q. Another applicant was Hancock Trucking, Incorporated. You know anything about that?

A. I have read of them. They operate through Ohio, Indiana, that territory, out of Chicago. They do not have very extensive rights, as I
1376 recall.

Q. Are they competitors of yours?

A. Well, they could be competitors in that particular part of the country.

Q. Now, in the period of, well, say roughly 1950 through 1957 -- 1950 through 1953 -- was this company active in the explosives trucking?

A. I don't know what their extent, Mr. Ball. I just don't know how much explosives business they had or how much business they had. They used to be owned pretty much by a carloading company.

Q. By what?

A. A carloading company. And most of their hauling was for carloading companies.

Q. You know which company that was? A. Universal.

Q. You don't know whether that situation is true today or not?

A. I do not know.

Q. You think that was, say, roughly the period of '49-'53 that they were owned by Universal?

A. I would not remember when it was.

Q. Now, another one of the applicants, Mr. Riss, was Interstate Motor Freight System of Grand Rapids. Are you acquainted with that company?

1377 A. Yes, I know who they are. I don't know where all they operate.

Q. Where do they operate?

A. They operate from Michigan, pretty much east.

Q. Are they serving a territory competitive with you? A. Yes.

Q. Where do they compete with you?

A. As I said, from Michigan, and Chicago to the east. Maybe many points in the East. I don't know what all the East they cover. But they cover quite a little territory in the East, I know.

Q. They also operate up north of Detroit and northeast of Chicago, do they not?

A. I do not know. But I am sure they do. I don't know all their territory.

Q. We took your deposition in December of this year, did we not, in Kansas City? A. Yes.

Q. That is, 1959, I should say. And do you recall that I asked you some questions about this company at that time?

A. No, I don't recall it, but if you will read it to me I will probably refresh my memory.

Q. I asked you this question. This is on page 207 of this deposition.

1378 "Question: What territory do they operate?

"Answer: They operate mostly up through Michigan and points north and northeast of Chicago.

"Question: That is territory which you do not serve?

"Answer: Serve, yes, sir.

"Question: Essentially, would Interstate Motor Freight operate out of Grand Rapids? It is not a competitor?

"Answer: Not in a big way along some points."

Does that refresh your recollection?

A. I will tell you right now: They were not considered very much of a competitor of ours. They operate to and from territory even though they were in the East where we were, and the bulk of their business was going to points that we did not serve. So therefore we could have handled all of our business through an interline but we did not consider them top competitor.

Q. Now, do you recall whether in the period of 1949 through 1953

this company was engaged actively in the explosives business, hauling business for the Government?

A. I don't know.

Q. They were not a substantial competitor of yours for explosives transportation at that time?

A. Mr. Ball, as I say, I do not know. I don't know how much
1379 business that other people haul; how much the railroads haul. All I know, what we hauled. I just don't have any idea how much they hauled.

Q. Now, Mr. Riss, have you any idea about the amount of equipment that this company operates today?

A. No, I do not. I don't know.

Q. You don't know whether it owns its own equipment or leases?

A. I do not. I understand they are on the market. They are publicly owned. I don't know if they still use owner-operators or if they own their own tractors. I don't know.

Q. You know whether it has bought any additional routes -- well, in the last five years?

A. To my knowledge, no. But I couldn't answer, because I don't know.

Q. Nor do you know of any sale of rights or reduction in the territory it served in the last five years?

A. No, I don't.

Q. Another one of the applicants was called Luper Transportation Company of Tulsa, Oklahoma. Are you familiar with that company?

A. I have heard of them. I do remember them. They used to operate out of Oklahoma. I haven't heard about them for years.

1380 Q. You remember whether or not in the period of '49 through '53 they were active in the explosives transportation?

A. I don't know.

Q. Were they a competitor of yours in any substantial way?

A. Yes. Luper used to operate St. Louis, I know, and I believe

he went into Chicago. I served points in Oklahoma.

Q. You don't know whether he is operating today at all?

A. No, I don't.

Q. Another one of the applicants for permanent explosives authority was Independent Truckers, Incorporated, in Omaha. Are you familiar with that company?

A. Never heard of it.

Q. Another one of the applicants was Union Freightways of Omaha. Are you familiar with that company? A. Yes.

Q. Where do they operate, if you know?

A. In Nebraska. I think they have sold now to a company in the West. Their main explosives operation was from points in Nebraska. I don't know how much rights they had. I don't believe they had any rights, because I know that we used to connect with them in Omaha. They would pick up at certain points in Nebraska where we did not have rights and bring
1381 it to us in Omaha. I believe some in Kansas City. I can't tell you all the places but I just don't believe that they had rights east.

Q. Now you are speaking of the period of 1949-1953 and relating it to explosives, were you not, in that answer?

A. I am speaking of the times I can remember Union Freightways. I don't remember the years. To my knowledge, even to this day, they don't go east.

Q. You did not regard them as a serious competitor for explosives traffic?

A. No. We regard them more as a help to us. In fact we got them in the explosives business; to connect with us in points they could serve and points we couldn't serve.

Q. Now, another one of the applicants was the Dakota Transfer and Storage Company of Minneapolis. Are you familiar with that company?

A. No, I am not.

Q. Still another applicant was Henniss Freight Lines of Winston-

Salem, North Carolina. Are you familiar with that line?

A. I know who they are. I know that they were hauling some explosives but how many I do not know.

Q. Were they competitive with you in the handling of the explosives business in '49 through '53?

1382 A. I don't know. I don't know.

Q. Another one of the applicants was Decatur Cartage Company of Chicago. Are you familiar with that company?

A. Yes, I am.

Q. Were they active in the explosives business in the period 1949-1953?

A. I believe they hauled some explosives but they are a very short line as far as we are concerned. They operate from Chicago and points in Illinois to St. Louis. They might have hauled some freight out of Joliet for a short haul. I don't think that they had very extensive rights.

Q. Are they still in business?

A. I don't know. It strikes me that they were sold but, again, they may not have been.

Q. You speak of "sold." You mean that their operating rights were sold to some other trucking company?

A. Yes, but I am not sure.

Q. You did not regard them in the period of '49-'53 as a major competitor?

A. Not -- Well, they hauled explosives and we knew they were hauling some explosives but we didn't -- they weren't mentioned, I will say that.

Q. Another one of the applicants was Carstensen Freight of Clinton, Iowa. You ever hear of that?

1383 A. No, I never have.

Q. Another applicant was Foster Freight Lines, Incorporated of Indianapolis. You ever heard of that applicant?

A. No.

Q. Another applicant was Denver-Chicago Trucking Company, Incorporated, of Denver. I am sure you were familiar with that company.

A. Very familiar with it.

Q. You recall where it has its headquarters?

A. Denver, Colorado.

Q. And what territory does it serve?

A. It serves a big territory from Denver west. They do operate Kansas City, St. Louis, Chicago, and they have one route up through Buffalo and Syracuse, into New York City. The only line that goes coast to coast.

Q. They are not competitive with you in the major part of their lines, the ones in the West; is that correct?

A. Yes; they are very competitive with me between many of my main points of my territory.

Q. Just where, Mr. Riss?

A. Well, from Chicago, the East, like Buffalo, Syracuse, Chicago, Detroit, St. Louis, Kansas City, Denver, all of our territory except the Southwest they are very competitive.

1384 Q. You regard them, then, as one of your major competitirs?

A. Yes, sir.

Q. However, to the extent that its operations lie, say, west of Denver they are not competitive?

A. Well, they are not competitive on the territories west like from Denver to California. But they are very competitive on freight moving from New York to California, because we could haul it to Denver and give it to PIE, for instance, or someone else.

Q. That has been true all of the period from '49 through '57?

A. I believe that is true. I don't know what year they bought their New York route but I believe they were there longer than that.

Q. You know whether this company has acquired additional routes in the last five years?

A. I don't know. I believe they have acquired some routes down into points in Kentucky, and south. But I am not sure.

Q. You have not heard of any sale of any rights by them to anybody else, have you?

A. No, I don't know of any rights they have sold.

Q. You know as of, say, 1957 how much equipment this company operates?

1385 A. No; no, I don't. They are doing a tremendous job, though. They have a lot of equipment.

Q. They are one of the large trucking companies?

A. Yes.

Q. You know whether this company, Denver-Chicago, handles much less than truckload shipments?

A. I do not know what their ratio is, truckload against l.t.l. They handle both, of course.

Q. You know whether this company owns its own equipment or not?

A. I don't know. They used to be owner-operators. Used to use their own operators. But since they have become owned by the public I don't know what they are doing today.

Q. Was this time they used owner-operator equipment all through the period of '49 through '53 to your knowledge?

A. I can't tell you, Mr. Ball.

Q. You know whether this company has in its corporate structure any side line activities such as manufacturing trailers or anything of the kind?

A. No. I know they have a division that handles bulk fuel. I know if they -- They have a basket ball team, they claim they are making a profit on.

THE COURT: Excuse me. Mr. Ball, again, as I did two or three times prior to this time, so that the jury will understand what you are
1386 trying to develop, will you tell us briefly the purpose of this cross-examination as to the witness's knowledge of the operations of other trucking companies that compete with Riss for this explosives traffic and who are applicants for permanent authority.

MR. BALL: I will be very happy.

THE COURT: So the jury will be able to understand, and the Court too.

MR. BALL: The jury and the Court will recall in connection with Mr. Riss's testimony an article in the Southern Railroad magazine "Ties" was introduced which contained certain statements about the number of applicants and the nature of the applications and the companies that were applying for permanent explosives authority at that time. And I wanted to find out from the witness as much as he knows about the background of that article that was raised.

THE COURT: All right. Very well.

BY MR. BALL:

Q. Do you recall whether it has any other special lines in addition to the oil hauling that you mentioned?

A. I don't know Mr. Ball, whether it has.

Q. You don't know whether it has a substantial refrigerator operation or not?

A. Yes, they do have. They haul refrigerator merchandise and compete with us quite a lot out of Colorado to the East.

1387 Q. That has been true throughout the period of '49 through '57; is that correct?

A. Yes, I am sure it has.

Q. One other question I want to ask you. Has this company been engaged in any major litigation with its sources of suppliers as you know of?

A. I don't know about litigation. I do recall one time that I heard

they were having some troubles with the equipment they purchased.

Q. You know from whom they were having any difficulty?

A. Fruehauf Trailer Company.

Q. Another one of the applicants, Mr. Riss, was Dohrn Transfer of Rock Island, Illinois. Are you familiar with that company?

A. I have heard of them. I know very little about them.

Q. They were not a major competitor of yours?

A. Not to my knowledge. I don't think that they gave us much competition.

Q. You don't know how active they were in the explosives business in the period of 1949-'53?

A. I don't.

Q. Another applicant was Hayes Freight Lines, Incorporated, Joliet, Illinois. I believe you have said they were one of your major

1388 competitors in explosives?

A. They hauled quite a little merchandise, I know, north and south, Illinois, and that area. They were not competitors of us from Oklahoma, and points in the East to points in the West. But they did haul quite a few loads of explosives north and south into Kentucky, Illinois, and the south from that area.

Q. Were they out aggressively trying to get a major portion of that business, do you know, Mr. Riss?

A. Oh, I don't know how much they solicited the business. I think a good part of it was offered to them by the Government because of lack of service. Service was needed.

Q. You know what territory that truck line served in '49-'53 other than what you have described?

A. No, I would not know.

Q. Was this company at the time '49-'53 a competitor of yours for general commodities?

A. Between certain points. Not a big competitor, no. They only covered a small portion of our territory as a competitor in general freight.

Q. They operated in territory that was not competitive to you in some extent?

A. Did they?

Q. Yes.

1389 A. Yes. But they have had big operations within our territory too, but they just didn't happen to compete with us everywhere. They did have a big business within our territory.

Q. Another applicant was Standard Freight Lines, Incorporated, of Chicago. That company familiar to you?

A. I know nothing about them at all.

Q. Another applicant was Carolina Motor Express Lines, Incorporated, of Indianapolis, Indiana. You know that one?

A. I know who they were. In fact the man that bought the Carolina line used to drive a truck for me. But how much explosives they handled I do not know.

Q. You know what territory they served?

A. I think pretty much from Indianapolis down through Virginia and West Virginia. I can't tell you.

Q. That would be largely territory not competitive with you?

A. Compete with us some but there, again, we have such a wide area that very few truck lines compete with us a hundred per cent.

Q. You know how active this company was in the explosives business in 1949-1953?

A. No, I do not know.

Q. Another one of the applicants was Healzer Cartage Company of Kansas City.

1390 A. Healzer.

Q. Is that it?

A. Yes. Headquarters was in Kansas.

Q. You are familiar with this company?

A. Yes.

Q. Were they active in the explosives business in 1949-1953?

A. I don't think very much. They could have been. As I say, I don't know what the other fellows were doing. I know what we were doing. And Healzer operated mostly from around Wichita, Hutchinson, Kansas into Chicago. Just how many explosives they hauled I do not know.

Q. You were not aware of them as a major competitor in the explosives business?

A. I just wouldn't know how much explosives business they had.

Q. Another applicant was C. I. Whitten Transfer Company of Huntington, West Virginia. You know anything about this company?

A. Know nothing about them at all.

Q. Another applicant was Brady Transfer and Storage Company of Fort Dodge, Iowa.

A. I know who they were. I don't know anything about them as far as explosives business is concerned.

Q. That would be true of the entire period of '49 through '57?

1391 A. Yes.

Q. Another applicant was Ringsby Truck Lines, Incorporated of Denver. You are familiar with this company?

A. Bought them out one time.

Q. You bought them -- had a line from them?

A. I bought their entire business at one time. I did not buy the name, so they started up another line.

Q. Where did this company operate in the period of '49 through '57?

A. Oh, I can't tell you. They operate from Chicago to Omaha, Denver, and how much west they go, I don't know.

Q. Were they a competitor of yours in the period '49 to '57?

A. Yes.

Q. You regard that as one of your major competitors?

A. They were quite active in business.

Q. You know how much explosives business they handled?

A. No, I do not. I know that we interlined some explosives business with them. Of course their territory, just where, I can't tell you. How much they handled I do not know.

Q. You of course wouldn't know how much equipment they had, were operating in that period?

1392 A. No.

Q. Another applicant was McNamara Motor Express, Incorporated, of Kalamazoo, Michigan.

A. Know nothing about them at all.

Q. To return to Ringsby, you know whether or not they had purchased additional operating authority in the last five years?

1393 A. I don't know. I heard they bought a carloading company, but I don't know if they bought any operating rights or not. I don't know.

Q. In other words, they may have a supplemental business in carloading; is that correct?

A. If they did, they did just recently because I heard just in the last six months they purchased a carloading company. That would be in the last six months.

Q. Do you recall whether they have in the last five years handled any special commodities, such as, tankers for oil and gas or automobiles?

A. I don't know. I don't think so but they might have. I just don't know.

Q. You don't really know very much about the nature of their particular operations?

A. No, I don't.

Q. The next applicant was Spector Motor Service of Chicago, Illinois. You know this company, do you not?

A. Very well.

Q. Where do they operate?

A. Generally from Boston, New York, Philadelphia, through Chicago and St. Louis, points in between.

Q. And that has been true since, say, 1949; is that correct?

1394 A. Yes.

Q. They are therefore a direct competitor of yours over most of your territory, is that correct?

A. They made a tremendous growth, yes.

Q. Have they acquired any new operating authorities within the last five years, if you know?

A. Not to my knowledge.

Q. And they haven't sold any operating rights during the last five years?

A. I wouldn't know whether or not they have sold any.

Q. Do you recall whether or not in the period 1949 to '53 they were active in the explosives business?

A. I do not know how much explosives they were handling.

Q. The next applicant was Hughes Transportation Incorporated of Charleston, South Carolina. I think I asked you the other day whether you know this company.

A. I wouldn't know them. We might have interchanged some freight with them, but I do not know them.

Q. You do not know what territory they serve or how active they were in the explosives business during the period 1949 to '53?

A. I do not.

Q. The next applicant was Buckingham Transportation Company of Rapid City, South Dakota. I am sure you know this company?

1395 A. Very well.

Q. Do you recall what territory they serve?

A. We had quite an interchange of business with them on explosives going to and coming from South Dakota and North Dakota. They operated generally from Denver up in that area. I believe they are going to Canada and back to Kansas City. They served Omaha; and they served from Denver to Chicago.

Q. With the exception of the Denver to Chicago and possibly Omaha to Kansas City, they largely served a territory north of your territory; is that correct?

A. Well, they had an operation in North and South Dakota which connected with the territory I mentioned, Kansas City, Omaha and Denver.

Q. Now, this is the company with which you have recently negotiated a sale of operating rights, subject to the authority of the Interstate Commerce Commission; is that correct?

A. That is correct.

Q. While we are mentioning this company, will you describe to the jury just what the rights are that are covered by this arrangment?

A. Yes. I sold the rights from Kansas City to Denver and Colorado points. I sold the rights from Kansas City to Oklahoma and Texas

1396 points. I retained my rights from Oklahoma and Texas to the East, through St. Louis; and I retained my rights to and from Colorado through Omaha to the East, to Chicago. I retained all of my explosive rights.

In other words; the only thing that we sold was our rights to and from Kansas City to the Southwest and to the West, and we did sell our rights from Texas, Oklahoma to Colorado.

Q. The purchase price named was a million dollars, is that correct?

A. That is correct.

Q. In addition to that, subject to the approval of the transaction, your affiliated company Transport Manufacturing and Equipment Company will lease space in the Kansas City terminal to Buckingham?

A. It is our hope they will.

Q. You have something of a verbal understanding, is that correct?

A. I hope that they will take some space. I will have some for rent.

Q. I didn't mean to ask a question that might affect your Interstate Commerce proceedings.

This is a growing company, is it not, Mr. Riss?

A. Yes, they were just recently put on the board. They are
1397 publically owned and they are making a lot of progress.

Q. They have purchased other operating rights in the last five years, have they not?

A. I don't know whether or not -- I believe they have purchased some rights up in Iowa and those points. I don't know exactly what it is though.

Q. Now, another one of the applicants for explosives authority was the Central Freight Systems of Chicago, Illinois. Are you familiar with that company?

A. I don't know them at all.

Q. You don't know where they operate?

A. No.

Q. Another applicant was Eastern Motor Express of Terre Haute, Indiana. Are you familiar with that?

A. Yes, that line has made a lot of progress during the last few years.

Q. And what territory did this line serve in the period of 1949 to '53, if you recall?

A. I can't tell you the whole time. They are operating between Chicago and New York and New England, and I believe they are going to

Philadelphia and they operate into Ohio, all the points in between. They are doing quite a business.

Q. Now, this company was a competitor of yours in the haul-

1398 ing of explosives in the period of '49 to '53, was it not?

A. I don't know to what extent. I don't know if they had explosives rights or not.

Q. Were they in that period regarded by you as a major competitor generally?

A. At the very first, they weren't; we soon learned to have respect for them. They are making quite a bit of progress.

Q. That is continuing today?

A. Yes.

Q. Another applicant was Dennis Truck Lines of Chicago, Illinois. Are you familiar with that company?

A. No, I don't know them.

Q. Another applicant was Indianapolis-Kansas City Motor Express. Do you know that company?

A. No, I don't know anything about them. I have heard of them.

Q. You don't know where they are located?

A. No, I don't.

Q. Or what territory they serve?

A. No.

Q. Another applicant for permanent explosives authority was Airline Express Incorporated. Do you know anything about that company?

1399 A. No, I do not.

Q. You don't know where they are located or where they operate?

A. No.

Q. Another applicant was P. M. Zimmerman Company of Chambersburg, Pennsylvania. Do you know that company?

A. No.

Q. You don't know where they operate or the territory they serve?

A. No.

Q. Capital Truck Lines Incorporated of Topeka, Kansas was another applicant for permanent explosives authority. Do you know this company?

A. No.

Q. Another applicant for a permanent explosives authority was McLean Trucking Company of Winstom-Salem, North Carolina. Are you familiar with this company?

A. Yes.

Q. What territory did it operate in the period of 1949 to 1953, do you know?

A. They operated from the east down to the Carolinas. I think that they went all the way up to Boston, I'm not sure, but they operated up and down the eastern seaboard to the south.

1400 Q. That was largely territory which was not competitive with yours, is that correct?

A. There again, to a small extent. We operated, we'll say, to Washington, D. C., and they also did. A good part of their business, I am sure, was from part of our territory to a territory they had and we did not have.

Q. Do you know how active they were in the trucking of explosives in the period 1949 to 1953?

A. No, I do not. I don't know anything about that.

Q. Has this company acquired any additional rights to your knowledge during the last five years?

A. I do not know.

Q. You don't know whether they have sold any rights during the last five years?

A. I don't know.

Q. Do you know anything about the nature of the commodities it transports, whether it's limited to general commodities or --

A. I know that they handle commodities generally but I do not know if they have any other specialized business or not.

Q. Have you any idea how much equipment this company operates?

A. No. I know they have quite a lot; I don't know how much.

1401 Q. That was true in 1949 to '53 also?

A. They have been making a constant growth steadily.

Q. Since that period 1949-53?

A. Yes.

Q. Now, the next applicant, Mr. Riss, was B.B. & I. Motor Freight Incorporated of Bloomington, Indiana. Did you ever hear of that company?

A. Never heard of it, no.

Q. The next applicant was Be-Mac Transport Company, Incorporated of St. Louis. Do you know that company?

A. I don't know that.

Q. The next applicant was P.B. Mutrie Motor Transportation, Incorporated of Boston. Are you familiar with this company?

A. No.

Q. The next applicant was Rocky Mountain Service, Incorporated of Santa Clara, Utah. Did you ever hear of this company?

A. No.

Q. The next applicant was Kramer Brothers Freight Lines, Incorporated of Detroit, Michigan.

A. I have heard of them.

Q. What territory do they serve, if you know?

A. They serve from Detroit -- How much of Michigan they have,

1402 I do not know. Their main headquarters is Detroit and they serve

from Detroit to the east, Philadelphia, Baltimore, New York; and they have made a constant steady growth and a very good one.

Q. Was this company considered by you in 1949 to '53 a major competitor for explsoives?

A. About explosives, I do not know; I don't believe so. That I can't tell you. They have been very very active in commercial business.

Q. Another applicant was Chicago Express Incorporated of New York. Did you ever hear of this company?

A. Very much.

Q. What territory do they operate?

A. They operate through Chicago, St. Louis and Kansas City -- I am sorry, they operate from New York to St. Louis and Chicago. I should say is the main territory; they do go into Kansas City also.

Q. And they are a competitor of yours, are they not?

A. Very much of a competitor.

Q. During the period 1949-53, were they a major competitor for explosives buseqss, if you recall?

A. I don't know how much explosives business they had.

Q. Did they operate in any other territory, to your knowledge?

A. I don't believe so, but I do not know.

1403 Q. Another applicant was Southwest Freight Lines, Incorporated of Kansas City, Missouri. Are you familiar with that company?

A. Yes, I know them.

Q. What territory do they serve?

A. Well, I believe they started out as contract haulers and they go to the east pretty much. I can't tell you all their territory.

Q. Do you think their territory largely competitive with yours or do they go into areas that you don't serve?

A. No, they are pretty competitive. I believe they were contract carriers at one time and I believe they changed to common carriers. That again, I'm not positive about.

Q. You don't know what their status was during the period of 1949 to '53?

A. I know they have made tremendous growth; I don't know how much. I can remember when I hardly knew who they were. You hear about them quite often at this time.

Q. Do you know how much explosives business they were handling in the period '49 to '53?

A. No, I don't.

Q. Another applicant was Wheelock Brothers, Incorporated of Kansas City, Missouri. Are you familiar with this Company?

A. Yes, I am.

1404 Q. Where do they operate?

A. They operate from Chicago to Kansas City and from Kansas City to Denver. I don't believe they have any other territory; they might. I can remember the day that they started in business. They each had a truck and drove it themselves. They did a consistent job. They were a small line, but have made a steady growth. I do not know how much explosives they haul however.

Q. Another applicant was R. C. Motor Lines of Jacksonville, Florida. I assume you don't know anything about that company?

A. No.

Q. Another was Wemham Transportation, Incorporated of Cleveland, Ohio.

A. I don't know that.

Q. Another applicant was Prucka Transportation Incorporated of Omaha, Nebraska. Are you familiar with that company?

A. Yes.

Q. Do you know what territory they served in 1949 to 1953?

A. They served from Chicago to Omaha mostly and from Omaha to Kansas City. They were prinipally meat haulers at one time. They had rights to haul commodities generally and they made a constant growth. How

large they are now, I don't know, but they are quite a bit larger than when they started.

1405 Q. Do you know how much explosives hauling they engaged in in the period 1949 to '53?

A. I don't know.

* * *

1417 Q. Red Ball Transfer Company of Omaha, Mr. Riss, did you know this company?

A. Yes.

Q. What territory did they cover? I am speaking now particularly of the period from 1949 to 1953.

A. Their headquarters were Omaha. They came into Kansas City. I believe they went into Chicago. But they were mostly known as Nebraska operators.

Q. They handled explosives in the period of '49 to '53, did they not?

1418 A. I think so. Yes, I'm sure we worked with Red Ball also.

Q. They were also competitive with you on some of the explosives business, were they not?

A. There again I don't think too competitive because they picked up at a point. I don't know too much whether Riss was going into a territory whether they could pick up and deliver.

Q. Now, another one of the applicants in addition to Red Ball was Mid-Continent Freight Lines, Incorporated of Oklahoma City. Do you know anything about this company?

A. I know about them, but I know very little about them.

Q. You don't know what territory they served?

A. They served out of Oklahoma into the east, but how far and where, I don't know.

Q. You don't know how active they were in 1949 to '53 in the explosives business?

A. I know they were doing some hauling out of Oklahoma City, out of Tincker Field. How much more they did, I don't know.

Q. Now, another applicant for permanent explosives authority was Liberty Motor Freight Lines of I think Secaucus, New Jersey. Have you ever heard of this company?

A. I know very little about them.

1419 Q. You don't know how much explosives business they handled nor where they handled it from 1949 to 1953?

A. No.

Q. Another applicant for permanent explosives authority was Mid-States Freight Lines, Incorporated of Chicago. Do you know anything about this company?

A. I know very little about them.

Q. You don't know again what territory they served in 1949 to '53 or how much explosives they handled?

A. No.

Q. Another applicant for permanent explosives authority was Seaboard Freight Lines of Chicago. Are you familiar with that company?

A. I believe that was a line that operated up and down the eastern seaboard, but I don't know about their operation.

Q. Another applicant for permanent explosives authority was National Freight Lines of Chicago. Do you know this company?

A. I don't know anything about them.

Q. Another applicant was Keeshin Motor Express Company, Incorporated of Chicago. Do you know that company?

A. Keeshin is an old truck line but I know very little about their operation any more.

Q. You don't know how much explosives they handled in 1949 to 1953 or in what territory?

1420 A. No, I don't.

Q. Another applicant for permanent explosives authority was Lipp

Truck Line of Kansas City, Kansas. Do you know this outfit?

A. No, I do not.

Q. Finally an applicant for permanent explosives authority was Watson Brothers Transport Company, Incorporated of Omaha. Do you know this company?

A. Very well.

Q. This was one of the largest of the haulers of explosives, wasn't it, in 1949 to '53?

A. They were pretty heavy haulers.

Q. What territory did they serve at that time, do you know?

A. They served primarily from Chicago to Kansas City to Nebraska. They were known as Nebraska haulers also. They also went out to Denver and out to the West Coast. I am sure they hauled a lot of explosives from Nebraska to the West Coast.

Q. They also had authority to operate at a government point known as Sunflower, Kansas, did they not?

A. Well, that's Kansas City. It is very close to Kansas City. We consider that Kansas City.

Q. How far out of Kansas City is it?

A. Fifteen miles or sixteen miles.

1421 Q. Watson was competitive with you in some of these places in the explosives business in 1949 to '53?

A. Yes.

Q. I believe you once said at a deposition, "They handled quite a few explosives", and that is correct?

A. Correct.

* * *

1428 Q. The nature, then, of the government explosives business was such that you would often have to send empty trucks a considerable distance to pick up a load of explosives, would you not?

A. That's in emergencies when the Government needed to make the boats and so forth, we would do that very often for them.

Q. And also there would be many times when you would have to deliver to a point and deadhead the truck home, is that correct?

A. Well, a short distance usually. For instance, points in Virginia, we might deadhead back to West Virginia or deadhead back to Baltimore. There were some occasions, however, when we deadheaded all the way back. If it was an emergency for the Government and they needed the freight moved for a particular reason, we did that very thing, yes, sir.

Q. I'm not sure the jury understands "deadhead". That means when you are hauling a truck over the road empty either to make a pickup or back after making a delivery, is that correct?

1429 A. "Deadhead" simply means operating without any pay load.

Q. When you speak of deadheading, do you regard a trip where less than half of the tuck is loaded as deadhead mileage or do you regard that as pay mileage?

A. Well, I think if you have any merchandise at all, it is not deadhead. However, I notice we have different ways of figuring it. On some of our LTL business, we consider --

THE COURT: Excuse me. Will you tell the jury what you mean by "LTL"?

THE WITNESS: Less than truckload lot.

THE COURT: Thank you.

MR. BALL: If the Court please, we may speak in railroading of LCL, less than carload lot; and in the trucking business, LTL means less than truckoad lot. Is that correct?

THE WITNESS: That was the old-fashioned way of saying it, less than carload lot.

Now, lots of times in the commercial business we figure anything under 5,000 is practically the same as a deadhead in conversation with a salesman. We don't consider that a load. But very often in the explosives business when we would haul 30 or 40 miles out of our routes, we did not consider that deadhead to get back the 30 or 40 miles.

1430-34 Q. The nature of the explosives business for the government was such that you had to do substantially more deadheading than with ordinary commercial traffic, isn't that correct?

1435 A. Well, in times of emergency -- in times of emergency we had deadhead trucks for the Government at the request of the Government. Whether it was profitable or unprofitable, we gave them that service.

Q. Well, as a matter of fact, you once estimated, did you not, that the deadheading on explosive business might run as much as 40 or 50 per cent of the total amount; is that correct?

A. I think it might, and it could. I do not know exactly what it was.

Q. Now, this amount of deadhead volume was one of the reasons you had to charge a higher rate for hauling explosives than you would necessarily have to charge for a similar load of commodities; is that correct?

A. Well, I wouldn't say that, Mr. Ball. As you know, the explosives business took a very high rate, and it was a very profitable business, and you could take your average and it came out very good, as our record will show.

Q: Now; did I understand your testimony to be that the ruling in Sub 60 T. A. proceeding, effective December, '53, made very little or no difference in the volume of explosives which you carried? Is that correct?

A. Well, you say that I say that it made very little difference?

Q. Yes.

1436 A. It made very little difference in the amount of volume we carried. It made a difference in us delivering it direct or having some interline hauling it all over 40 mile distance. For instance, we get into Baltimore -- I am using this for example -- maybe we had a point 30 or 40 miles that we would have to hook up with an interline to take it down there, where, if we were delivering it ourselves, we would deliver it direct, and the volume would be there but we would have to pay a certain amount to the interline to take it that 30 or 40 miles. So, therefore, it would affect our percentage of dollars somewhat, but very little, but it didn't affect our tonnage, because if we hauled it all the way or half the way, we still had the same tonnage.

* * *

1449 Q. You don't know, of course, what the operating costs for the railroads are per ton miles, either, do you?

A. Do I know?

Q. Yes.

A. They are very low, I believe, as compared to ours. They are quite a bit lower than ours.

* * *

* * *

CROSS EXAMINATION OF MR. RICHARD RISS BY MR. McGLOTHLIN

1542 Turning to 1950, ***

Q. Your son became President that year, did he not?

A. Yes.

Q. At what time of year did he become President?

A. On his birthday.

Q. That doesn't help. What was his birthday?

1543 A. Well, that's right. May the 27th.

* * *

1547 Q. And in 1957 you became President again; is that correct?

A. Correct.

Q. In the latter part of the year, was it not?

A. Yes.

Q. What salary did you receive in '57?

A. This was where the big cut came: $34,000.00.

Q. And what expenses? A. $22,000.00 expenses.

Q. Reimbursed.

And did you again receive a salary from T. M. & E. that year; do you recall?

A. Yes, I have been receiving salaries from T. M. & E.

1956 was the first year I received a salary from T. M. & E., I believe.

A. And you have ever since, have you?

A. Yes.

Q. In the same amount of $30,000.00 a year?

A. I think so.

Q. In 1957, Mr. R. B. Riss is indicated, I believe, as a Director, but not an officer. Did he draw a salary from Riss & Company in that year?

A. Well, yes. He worked for Riss & Company up until
1548 the first of October of 157. He was only off a couple months.

* * *

1570 Q. Now, I don't want to get into this in detail, Mr.. Riss, but I want to ask you who, in the company, had the authority to decide When Riss would enter and when it would retire from rate bureaus of
1571 motor carriers?

A. Well, I think the President had that power to do that, but usually that was taken up with me. Anything of any importance in the company was taken up with me, and that would be one that we would consider very important.

* * *

CROSS EXAMINATION OF MR. RICHARD RISS BY
MR. McGLOTHLIN

* * *

1596 Q. Now, there was a time, was there not, when part of the business of TM&E was leasing terminals to Riss and to other companies?

A. Still is.

Q. It still does that?

A. Yes.

Q. In the period 1950-1954, did Riss & Company lease most of its terminals from TM&E?

A. There was a period, and I can't tell you the exact date, that Riss & Company, in order to save bookkeepers and so forth, took over all of the buildings of TM&E, took over all the rentals and handled them for TM&E, In other words, Riss & Company made a profit off the management of the buildings for TM&E.

Q. Prior to that time of the take-over, the arrangement was, was it not, that TM&E owned the terminals and leased them to Riss & Company?

A. They do that now. They lease portions of them to them. You see, there are big terminals and other terminals of part and Riss & Company has part.

* * *

1598 Q. Another aspect of TM&E's operations, which began as early as 1950 , was ownership of trailers and leasing them to Riss & Company?

A. They still do.

Q. And they still do?

A. Yes.

Q. And sometime in 1954, I believe it has been established but I want to get my thoughts in line, TM&E acquired more tractors than they had before and started leasing those to Riss & Company; is that correct?

A. That is correct.

Q. TM&E is not a company that leases tractors, during this period of '54-'57, generally to any trucking company that wants them?

A. No, they do not lease to anyone but Riss. A few, but nothing to speak of.

* * *

1599 I understand these tractors, new tractors, were delivered in 1954, started therein?

A. Yes.

Q. I believe you told Mr. Ball yesterday that it was you who had decided to buy those?

A. Yes.

Q. Who made the decision?

A. Yes.

Q. Can you approximate for me what time it was in 1953 that you resolved to buy them?

A. Well, I believe it was -- I think actually it was in the early part of '54. We talked about buying tractors all new in '53 and I talked to several people; the Mack people, the International people, and White people, and finally settled on General Motors. I think it was the early part of '54 that I bought them.

Q. Just about the turn of the year?

A. I think so. Somewhere the first part of the year.

* * *

1629 On December 9,, 1953, Mr. Riss, Mr. Layne filed on behalf of your company, did he not, with the Department of Defense a brief seeking its support. I will show you a copy to refresh your recollection.

MR. McGLOTHLIN: I have handed a copy to plaintiff's attorney.

(Witness perused document.)

BY MR. McGLOTHLIN:

Q. That is your company's brief, is it not, Mr. Riss?

A. Yes, it is.

Q. May I have it. (Document handed to counsel.)

1630 Attached to the brief, Mr. Riss, is a document entitled, "Relation of Riss authority as interpreted by the Commission to the need for service stated by the Army, Navy and Air Force."

That document has a first section which recites the support that the Navy had given to the granting of motor carrier authority on ICC proceedings and then it cites the points that Riss will continue to be able to serve.

Then there is a section that I want to ask you about in which Mr. Layne advised the Department of Defense: "Riss & Company will not be able to continue to provide service between the following points:"

The first one he gives is Crane, Indiana -- That's here (indicating), is it not?

A. Yes.

Q. -- and Hingham, Massachusetts. That is just below Boston, is it not?

A. Yes, sir.

Q. Now, was Mr. Layne correct in saying you couldn't take ammunitions from Crane into Hingham?

A. I believe that that was the order, but I can't tell you -- At one time it was an order. I can't tell you the exact date. At one time that authority was cancelled between Crane and Hingham.

1631 Q. You have no doubt, Mr. Riss, that Mr. Layne was correct in his statement?

A. I have no doubt that he was correct in his statement. If he stated that, it was correct.

Q. The next point Mr. Layne says you will not be able to serve under the order is from Crane, Indiana -- which is from here (indicating) -- to Indian Head, Maryland, which is one of these yellow stars down below Washington; is that correct?

A. Yes, sir.

Q. And you would, therefore, not be able to carry ammunition into Indian Head; is that correct?

A. Correct.

Q. The next group that Mr. Layne mentions is between Hastings, Nebraska, which I think we can agree is beyond the map --

A. Yes.

Q. -- and Yorktown, Virginia, the Naval Mine Depot, at the mouth of the Chesapeake Bay, another yellow star; is that correct?

A. Correct.

Q. You could not carry ammunition into that point from Hastings?

A. We could by interline.

Q. No, direct is what I am talking about.

1632 A. Direct, no.

Q. It gives the same thing from McAlester, Oklahoma into Yorktown; is that correct?

A. That is correct.

Q. You couldn't serve direct there?

A. There again you are asking me questions I do not know. The records should speak for themselves. I cannot tell you at which time what points -- The records will tell you what the order says; I do not know.

Q. You would rely on Mr. Layne's statement?

A. Mr. Layne should know what the final order of the Commission was though I cannot tell you. That may have been one of his arguments prior to the final order, so I am not in a position. The man who is going to testify after me is going to tell you about each and every one of those.

Q. I'll stay with you for a while.

A. All right.

Q. Mr. Layne also told the Department of Defense that you would be unable to continue to provide service between those same points, Hastings, Nebraska, to McAlester, Oklahoma and Portsmouth, Virginia, Saint Juliens Creek -- that's this red mark down here, is it not?

A. Yes.

Q. And the stars about it. So you were unable to provide service from Hastings and McAlester into those points, is that correct?

1633 A. If that is what the order says.

Q. Mr. Layne also advised the Department of Defense that you would be unable to continue to provide service between Hastings and McAlester on the one hand, which is out there (indicating), and Earle, New Jersey, which is a point just out of New York; is that correct?

A. That is what he said to the Army and Navy to solicit their help -- That is what he stated to the Army and Navy and so solicited their support in a hearing before the Commission. He was bringing out to them that there would be loss of service between those points.

Q. He said particularly the words, "Riss & Company, Inc. will not be able to continue to provide service between the points" I have pointed out to you.

A. If we do not get your support in getting the Commission to rule in our favor.

Q. That is right.

He further said that Riss & Company would not be able to continue to provide service between Hastings, Nebraska and McAlester, Oklahoma and Hingham, Massachusetts, which is the point we identified before which is just outside of Boston; is that correct?

1633-A A. Yes.

Q. So you would not be able to carry from Hastings and McAlester to those points? Is that correct?

A. Yes, if that is what the record says.

Q. Would you like to verify it?

1634 A. No, I am saying that I know that that's what he said to the Army and Navy. He probably told them that there was no other service as good as ours, and we should be allowed to handle that, merchandise between them. I don't see anything wrong with the attitude, of course.

THE COURT: Well, I will strike that.

* * *

1635 I think the pending question was: Was Mr. Layne correct in saying that under the order, Riss & Company will not be able to continue to provide service between the following points: Earle in New Jersey, on the one hand, Yorktown, Virginia, Hingham, Mass., and Portsmouth, Virginia, on the other?

A. Well, I am very sure that he was correct, if that is what he said in asking the Army for the support; I am very sure that is correct.

Q. On the next page, Mr. Layne said to the Army, among other things: Under the permanent authority of Riss and Company and the temporary authority of Riss and Company, as interpreted by the Commission in Sub 60TA, Riss and Company will have authority -- and then he lists several states --

MR. BRIDGEMAN: Wait until I have it.

MR. McGLOTHLIN: Excuse me. I will read it: Continue to have certain regular or irregular route authority in the states of Pennsylvania, New York, Massachusetts, Connecticut, New Jersey, Maryland and Ohio.

It will not have regular or irregular route authority for the transportation of ammunition, explosives and component parts thereof in the states of Rhode Island or Delaware. That's correct, is it not?

1636 A. Correct, sir.

Q. Riss and Company will not have authority to serve many of the Army and Air Force installations in the states of Pennsylvania, New York, Massachusetts, Connecticut, New Jersey and Delaware.

Neither will it have authority to serve many of the Army and Air Force installations in the state of Ohio. That's correct, is it not?

A. Correct.

Q. Mr. Layne continued: The representative of the Army and Air Force testifying on behalf of the Department of Defense, named 25 specific Army and Air Force installations in the territory now under consideration.

Of the 25, Riss and Company will be able to serve only Frankfort Arsenal at Philadelphia, Pennsylvania.

Now, of all the yellow spots, that is the one here. (indicating on map)

And Springfield Armory, Springfield, Mass., which is the one here at western Massachusetts.

Under the Commission's limited interpretation, to serve the other 23 points on both east and westbound movements, enlargement of the authority in Docket No. MC 200 (sub. 60TA) as now interpreted by the Interstate Commerce Commission would be required as follows -- and then there are listed three or four or more pages of additional authority that you would need.

1637 Is that correct as to the extent of the points you would be deprived of, 23 out of the 25?

A. I do not know. If that is what Mr. Layne said, the chances are it is correct.

Q. In the same brief, Mr. Layne attached a schedule, two schedules; one is called Summary of Explosive Shipments Handled by Riss and Company, Inc., on Behalf of Department of Defense, during September, 1953, Alphabetically by Origin City.

I show you that. (Handing to Witness)

Now, in explanation of these schedules, Mr. Riss, I meant Mr. Layne, stated on page 10 of his brief in the text, in a heading called: The Effect of the Commission's Interpretation as Related to Present Movement of Explosives.

MR. WRIGHT: Where is that?

MR. McGLOTHLIN: Page 10, of the text. Mr. Layne said, "An analysis has been made of the effect the application of the Commission's restrictive interpretation would have had if applied to the movements of dangerous explosives handled by Riss during September and October, 1953.

"This analysis demonstrates that of the total of 57,715,626 pounds of explosives moved in September, the order of the Commission would have affected 35,028,921 pounds involving 1,256 truck movements of the total of 55,025,307 pounds moved in October, the Commission's order would have affected 43,075,360 pounds involving 1,522 truck movements."

1638 Now that is correct as far as you know, is it not?

A. Well, I gather that's probably correct before he knew that we could get interlines, interline with us to the points, which we did later.

Q. Now, I continue to explain the schedules now in the questioning.

"There is attached for each of the months of September and October, 1953, a detailed analysis of the explosives traffic handled by Riss for the armed services which will be affected by the order of the Commission.

"The analysis was prepared by points of origin of the movements. It shows for each point of origin, the destinations of the movements, the number of loaded units dispatched, the weight, loaded miles traveled, and deadhead miles necessarily involved.

"Each of the movements indicated will be affected by the Commission's order either by elimination of authority to serve the point of origin or destination or in some few instances elimination of authority to serve both the point of origin and destination."

And now I want to turn, if I may, to the schedule, Mr. Riss, and I will ask you some questions about that.

The schedule for September, 1953, indicates that Riss moved over 166,000 pounds from Aberdeen Proving Ground, Aberdeen, Maryland, and that the order would have affected that movement.

1639 As far as you know, is that correct?

A. Yes, as far as I know, it affects all those movements that you have talked about.

I just don't know what the order says or what the Commission's order was at that time, particularly.

Q. I won't take all of these, Mr. Riss. But the schedule indicates that from the Iowa Ordnance Plant, Burlington, Iowa, Riss, in September 1953 moved 2,409,404 pounds; and that all those shipments would have been affected by the order, is that true, as far as you know?

A. Well, affected -- the fact that we would have to use an interline, of course.

Q. On the second page of the schedule for September, it is indicated that in September, 1953, Riss and Company moved from the Indiana Arsenal, Charleston, Indiana, to a number of destinations in the East, some in the Southwest, a total of 4,554,371 pounds.

And the schedule indicates that all of those would have been affected by the order. Is that correct, as far as you know?

A. My answer will have to be the same for all the questions you are asking me because I just don't know.

Q. On page 3, there is indicated that from the Sunflower Ordnance Plant, DeSoto, Kansas, to the Proving Grounds at Madison, Indiana, and to the Powder Factory at Indian Head, in September Riss moved 1,360,058 pounds, and it is indicated that although you still have power, you still have authority to move away -- explosives from Sunflower, you would not have authority to move it to those destinations.

1640 Is that correct?

A. I don't believe that is true because towards Sunflower, which is practically Kansas City, we had the right to go to all the points that were in pink on that other map.

Q. That is, one way?

A. One way.

Q. I mean --

A. That happened to be the only way explosives were moving, one way.

Q. So you think Mr. Layne erred in this?

A. I think that, he mentioned, let's put it, if we couldn't, if there were any freight, that the freight was moving from Sunflower this way. We had the right to handle it.

* * *

1666 Q. You told us that the decision to buy 500 new tractors was made to the best of your recollection early in 1954; is that correct?

A. I think that I told you that the purchase of them was in the early part of 1954. I think we were thinking about them as early as '53.

Q. Can you fix me any time when your mind was made up that you were going forward and buying new tractors?

A. Oh, I am very sure in '53 that I decided we were going to buy tractors. Business had been picking up, and I decided we would need more equipment.

I can get the date of the order when I purchased the GMC's.

Q. I will show you that in a minute, but I want to know when the decision was made.

A. I think, I don't know, and there again you are talking about many years back, and I had many deals, and I cannot recall each and every deal, but it strikes me it was some time in 1953, and I made the purchase as early as '54.

Q. Also, in 1954, TM&E purchased 800 new trailers, did they not?

A. I believe it was 1200.

Q. 1200?

A. Yes.

* * *

1709 Q. In 1957, it is a fact, is it not, Mr. Riss, that Riss and Company had more revenue ton miles in piggy back service than it did in over-the-road service?

A. I believe that is correct. All of our eastern operation or most of the eastern operation, a good portion of it, was piggy back; where our western operation was by truck, other than Dallas and Fort Worth, and I would say that a substantial amount of it was piggy back.

Q. I believe at one time you were giving around 700 trailers a week from the Pennsylvania, were you not, piggy back?

A. Yes, I was.

Q. Now the use of the railroad to make a haul, for example from New York to St. Louis, reduces the need of a trcuking company for over-the-road tractors; does it not?

A. I would say it reduces the need of a trucking company, it reduces the need of tractors if you are going to use piggy back to line haul or haul it over the road, you still have to have tractors to pick it up and deliver it.

Q. Well, I didn't mean to imply that you didn't need any tractors. All I mean is, you need less to do it the same way, to do the same amount of business; isn't that correct?

1710 A. Well you just don't need any for the highway, for a part of it.

MR. McGLOTHLIN: Would you read the question, please?

(The reporter read the pending question.)

THE WITNESS: Well yes, you would need less tractors to haul the same amount of loads.

By Mr. McGlothlin:

Q. As a matter of fact, in 1957, Riss and Company turned back to TM&E some tractors it didn't need, did it not?

A. No. They didn't turn them back. They have some tractors, a lot of tractors against the fence, as we call it. We just put them in the yard and didn't use them any more.

Q. Did you continue to pay rent on them to TM&E?

A. We did for a while. After a while, no.

* * *

CROSS EXAMINATION OF MR. RICHARD RISS

* * *

1787 BY MR. RHOADS

Q. Could you tell me about how many trucks you had in that operation back in 1927; was that it?

A. Oh, I think there was ten or twelve.

* * *

OUT OF PRESENCE OF JURY

1832 THE COURT: Well, isn't the jury entitled to the whole picture? Do you mean to say they are not entitled to find what the evidence was as a result of a man who actually heard the evidence, the examiner, examined the witnesses and heard them testify, that he can't give his summary of what the evidence was?

MR. BALL: For the simple reason that the whole issue in this case is motive on the part of these defendants. When you have a judicial determination that the evidence that was introduced was relevant, was considered by the Commission, and was the basis of the Commission's decision, then there is no way by which you can go back and say that there was any motive other than the presentation of the case without challenging the correctness of the Interstate Commerce Commission's ruling on relevancy of the evidence.

THE COURT: I know when you want to start comparing the type of evidence that was introduced in the Noerr case as compared to this, all you have to do is start thinking about the so-called Wheeler report that was offered in evidence as part of the plaintiff's case in the Noerr case, and the Court of Appeals didn't say a word about it, didn't say it was error or not. I mean, there was a decision or at least a finding by a Congressional Committee composed of members of both parties. Now, if that was not error in that case--and apparently it wasn't, because the Court didn't mention it, I don't see how it could be reversible for the Court to admit in evidence all of these proceedings in this case.

1833 MR. BALL: May I make the distinction here, if the Court pleases. The Commission was the final determiner of the facts in the Sub 84 decision. Certainly, the decision of the Interstate Commerce Commission is an entirely different kind of a function than the comments of Congressmen in making a Congressional report.

Now, the point I am making here is that in the Wheeler report the report condemned the actions of the railroad in this particular situation. The Interstate Commerce Commission report approved the action and the conduct of the railroads in the presentation of evidence. All I am trying to say is that we are not objecting. I have never implied that we are objecting to the introduction of the final ruling of the body charged with the making of the final determination of the facts and the final determination of relevance and significance of the facts. When the Interstate Commerce Commission in its final report in an order to which I just called the Court's attention determines that what the railroads introduced was germane to the issue, that is a judicial determination that that was germane to the issue and that is a final and conclusive determination on the relevance of the motive.

1834 THE COURT: Now, you gentlemen knew this legal problem was going to arise. Have you got any authorities on it?

MR. BALL: I simply refer you to the statement made. If the Court please, I have cited authority in the original statement of our issues that we submitted.

THE COURT: I have already ruled on the objection. Let us proceed.

* * *

DIRECT EXAMINATION OF MR. IVAN MOODY BY MR. LAYNE

* * *

1966 Q. Yesterday, Mr. Moody, I concluded at the end of the day reading a decision of the Interstate Commerce Commission in a proceeding known as MC-200, Sub. 60 T.A., and I would like to ask you whether or not you know if that decision was by Riss & Company appealed to the United States Courts? A. Yes, it was.

Q. To what Court was an appeal taken?

A. First there was an appeal to the United States District Court in Kansas City, Missouri.

Q. And at that time was a stay or an injunction against the order or a restraining order issued by the District Court?

A. Yes, there was.

Q. Now, was there subsequently a decision by the District Court of the United States in the Western District of Missouri in that case?

A. Yes, sir.

1967 Q. Did it sustain or reverse the order?

A. It sustained the order of the Interstate Commerce Commission.

Q. Was there thereafter an appeal taken to the United States Supreme Court by Riss & Company from the decision of the United States District Court? A. Yes, sir.

Q. Was there an injunction and a stay issued by the United States District Court and by a Justice of the Supreme Court of the United States in connection with the order?

A. Yes, sir. The United States District Court of Kansas City gave a temporary restraining order pending the appeal to the United States Supreme Court, and the United States Supreme Court then continued on their own another injunction pending final determination on their part.

Q. Now, was the appeal decided by the Supreme Court of the United States? A. Yes, it was.

Q. What was the action of the Supreme Court of the United States in that case?

A. They upheld the order of the Interstate Commerce Commission.

Q. Now, by the terms of the order of the Supreme Court, did the injunction and stay, that had been issued, expire?

A. They gave an effective date after their opinion for the termin-
1968 ation of the restraining order, having a termination date of December 28, 1953.

* * *

BY MR. LAYNE:

Q. What was the result of that decision, Mr. Moody, of the Supreme Court?

A. As a result of that decision, the order that was read by Mr. Layne yesterday, designated an interpretation of Sub. 60 T.A., went into
1969 effect on December 28, 1953.

Q. Now, Mr. Moody, in your duties in 1957 and in 1956 as head of the Legal and Commerce Department of Riss & Company, were you ever called on to interpret or apply for Riss & Company the decision of the Commission in Sub. 60 T.A. ?

A. Yes, sir, many times.

Q. Now, I would like to move this map so the jury can see it.

Mr. Moody, first let me call your attention to Plaintiff's Exhibit No. 2, and ask you whether or not the routes contained in the interpretation of the Interstate Commerce Commission, which I read to the jury yesterday, are reflected in that exhibit? Are they?

A. Yes, sir, that is an exhibit of the routes that were entailed in Sub. 60 T.A.

THE COURT: Is that Plaintiff's Exhibit 6?

MR. LAYNE: Plaintiff's No. 2, Your Honor.

THE COURT: Number 2; all right.

BY MR. LAYNE:

Q. Now, are the routes contained in the decision of the Commission in Sub. 60 T.A., reflected on that Exhibit No. 2 in some particular,

1970 color or in some particular way?

A. Yes, the part that is marked there in green is the area and the routes that were involved in Sub 60 T.A. Now, this happens to be designated as reflecting routes to transport explosives, so the part that is in red shows the part that was permanently authorized to Riss to transport explosives.

Then, of course, the part in green was a temporary authority. That has no bearing on the general commodity authority as such.

Q. Now, does Plaintiff's Exhibit No. 2 also reflect the irregular route authority for the transportation of ammunition and explosives contained in the temporary authority, Sub 60 T.A., as interpreted by the Interstate Commerce Commission?

A. Yes, sir, there were a couple of irregular route authorities granted, or, rather, involved in temporary authority, and the part that is designated in pink on the map portrays the irregular authority over the gateway of Fairfax, Kansas, which is the same, practically, as Kansas City, Missouri, through that gateway to all points and places marked in pink.

* * *

1973 Q. Let us first take the period 1954 to '57, Mr. Moody.

A. Yes, sir. During the period 1954 to 1957, Riss & Company could perform through service of any explosives from Pueblo Ordnance to Boston, Massachusetts, or to Springfield, Massachusetts, by tacking or combining the routes at Fairfax, Kansas, which is Kansas City, Missouri, Kansas City, Kansas.

Q. Would it be possible under the routes shown to transport from Pueblo Ordnance Depot to Boston, Massachusetts, whether or not you went through Fairfax, Kansas, using the routes shown on Exhibit No. 2 in red and green?

A. Yes. Actually, you would not have to tack because both Boston and Springfield, Massachusetts are authorized points for general commodities, and also authorized by Sub 60 T.A. So you could combine any of these routes you might want to use.

1974 Q. Was that true during the period 1954 to '57? A. Yes, sir.

Q. Now, let us take the reverse movement, from Boston, Massachusetts or Springfield, Massachusetts, to Pueblo Ordnance Depot, Pueblo, Colorado.

I think it might be helpful to the jury if you could point out, Mr. Moody, the location of Pueblo, Colorado.

A. Pueblo is right here, south of Denver, approximately 50 or 60 miles. Springfield, Massachusetts would be about here, the south central part of Massachusetts. Of course, here is Boston.

Both of those are certificated points to Riss & Company. So you could go in a reverse trip, hauling explosives to Pueblo. You could go either way.

Q. During the period 1954 through 1957, did Riss & Company operate the transportation of explosives from Boston, Massachusetts, to Pueblo, Colorado over the routes shown in green and red on that map in the transportation of ammunition and explosives?

A. Yes, sir; they could go in either direction.

Q. Now, I would like to give you another example. Let me give you an example of a movement from Chicago, Illinois to Ravenna, Ohio, a point in the transportation of ammunition and explosives during the period 1954 through '57, a shipment originating at Chicago, Illinois and destined to a point at Ravenna, Ohio in the State of Ohio?

1975 A. Yes, that is part of the irregular route authority, from Chicago to all points and places in the State of Ohio, so that transportation could be performed during the period 1954 through '57, inbound only from Chicago to all points and places in Ohio, among other States.

Q. Now, let us take the reverse. Was that true during the period 1954 to '57?

A. Yes, sir, that is true.

In reverse, you could not; you could not haul from Ravenna, Ohio back to Chicago.

Q. Now, in a movement from Ravenna, Ohio to Chicago, in a reverse direction, where the shipment originated at Ravenna and terminating at Chicago, what was the closest point that Riss was authorized to serve in the transportation of ammunition and explosives to Ravenna?

A. Akron, Ohio would be the closest certificated point, and, therefore, to transport back out of Ravenna to Chicago, it would be necessary to have an interline connection with some carrier that could serve Ravenna, and that carrier then would bring it to us at Akron, and interline to us, and we would transport it from that point, then, on to Chicago.

Q. Now, let us take another shipment during the period 1954 through '57. Let us take this shipment starting at the Naval Ammunition Depot at McAlester, Oklahoma, and would you point out on the map, Plaintiff's No. 2, the Naval Ammunition Depot at McAlester, Oklahoma?

1976 A. McAlester is out here, right here, right in between Muskogee and Atoka, half way, right here, shown on this map.

Q. Under Riss & Company's authority on Exhibit No. 6, is Riss & Company authorized to serve in the transportation of ammunition and explosives to McAlester, Oklahoma?

A. Yes. This is under permanent authority, we serve that point.

Q. Let us take a shipment from the Naval Ammunition Depot at McAlester, Oklahoma to the Naval Ammunition Depot at Crane, Indiana. Will you point out to the jury on Exhibit No. 2 the location of the Naval Ammunition Depot at Crane, Indiana?

A. Crane happens to be marked here, I believe, in this large size with red dots, in that general area.

Q. Now, by what combination of what authority, if any, could Riss transport ammunition and explosives during the period 1954 through 1957 from the Naval Ammunition Depot at McAlester, Oklahoma to the Naval Ammunition Depot at Crane, Indiana?

A. Well, Crane, Indiana is not what you call a certificated point on the Riss route. Therefore, it was necessary to go from McAlester through

Fairfax, at the Kansas City Gateway, and then to Crane. We could go from there to all points and places in Indiana.

Q. Did Riss deliver that shipment direct to Crane, Indiana?

1977 A. Yes.

Q. Its vehicle under its supervision or its driver could go direct to the Naval Ammunition Depot at Crane, Indiana?

A. Yes, it could.

Q. Now, let us take the reverse movement, in the period 1954 through '57, what is the situation with respect, with respect to what the situation was, with respect to the movement of ammunition and explosives that began, originated at the Naval Ammunition Depot at Crane, Indiana and destined to be delivered to the Naval Ammunition Depot at McAlester, Oklahoma?

A. Well, they no longer could serve at a point on these places. So it was necessary to set up, beginning the first of 1954, an interline connection point, at some place that presently had service.

Now, the nearest place that we had was Louisville, Kentucky, which is right here, across the Indiana line.

So another carrier would bring the load from Crane down to the explosives parking lot that we had there in Louisville, and there Riss & Company would then take it over its regular routes back to McAlester.

Q. Now, I would like to give you another example during the period 1954 to '57, under the authority that we read to the jury in Sub 60 T.A.

Let us take a movement from the same Naval Ammunition Depot at McAlester, Oklahoma to the Naval Powder Factory at Indian Head, Maryland. Under what, if any, authority during the period 1954 through '57, would Riss serve in the transportation of ammunition and explosives from McAlester to Indian Head, Maryland?

A. Well, of course, as I said, we had authority at McAlester, but they had to come up over the Kansas City Gateway, and Indian Head, Maryland is not a certificated point on Riss routes; and, therefore, beginning the first of the year 1954, January 1, 1954, we would take that to Baltimore, which

would be the nearest point to Indian Head, and at this point we would have to interline it to another carrier, who would make the delivery.

1979 Q. So that in the period 1954 through '57 did Riss deliver -- was Riss authorized to deliver to the Naval Powder Factory in Indian Head, Maryland?

A. No, sir; we could not deliver or pick up.

Q. What was the closest point you could take ammunition and explosives -- to transport ammunition and explosives in relation to Indian Head, Maryland?

A. Our closest point was Baltimore, and we did receive a temporary authority for the interlining of these explosives at a place called Chaney's Truck Stop, Gambrills, Maryland, a place out of Baltimore, so it wouldn't go through Baltimore city.

Q. Now, what about the shipment in the reverse direction from Indian Head, Maryland to McAlester, Oklahoma, for example?

A. Another carrier would have to pick it up at Indian Head and bring it to us at an interchange point in Baltimore, and from there would go over our regular certificated routes to McAlester.

Q. Let me ask you in these general terms with respect to the transportation during the period 1954 through 1957 of ammunition and explosives under the authority of Riss & Company that Riss & Company held as interpreted by the Commission, and its permanent authority, was Riss authorized to serve directly any point in the state of Massachusetts?

A. Yes. We could serve the points that we had under our general

1980 commodities authority; the main points, Boston, for example, and Springfield, Westover, Mass. Under an irregular route authority running over Kansas City or through Chicago out of Omaha, we could serve all intermediate points marked here in green, by going over those gateways.

Q. Could you serve all those intermediate points over those gateways for the delivery of traffic, or for the origination of traffic?

A. That would be for delivery only.

Q. Let's take the state of Massachusetts: did Riss & Company during the period 1954 - '57 have authority, temporary authority, as interpreted by the Commission to originate shipments or to take shipments from any point in Massachusetts?

A. By that you mean shipments of explosives?

Q. Yes. Shipments of explosives -- ammunition and explosives.

A. We could take from the main certificated points which, in the case of Massachusetts, would be Boston and Springfield, mainly, and Westover Field, I believe -- the only places we could haul from. There is another one -- Gloucester, Massachusetts. We could haul from there to Kansas City.

Q. What is the situation with respect to the state of Connecticut during the period 1954 in the origination and termination of shipments by Riss & Company in ammunition and explosives?

1981 A. We could deliver only to the named certificated points we had in Connecticut, and unless we went over the gateway of Chicago, Kansas City, Omaha, then we could deliver to the points on these green lines -- any intermediate points on the lines. We couldn't deliver to any place that is not on this highway.

Outbound, we couldn't originate outbound -- only from our certificated points. In other words, we could not originate from points and places on the highway; only the points we had certificated authority -- general commodity authority.

Q. Let's take the state of Delaware.

A. Delaware, prior to 1954 --

Q. Let's take the state of Delaware during the period 1954 - '57.

A. 1954 to 1957 we could not deliver in Delaware, or haul out of Delaware. It had to be done by interlined connections.

Q. What was the closest point Riss & Company was authorized to serve in transportation of ammunition and explosives during the period '54 through '57 to the state of Delaware, or shipments going into the state of Delaware?

A. Generally, those were interchanged either at Philadelphia to another carrier.

Q. Are those the closest points then for transportation of ammunition and explosives as far as Riss & Company is concerned in the period of '54 through '57 -- outbound shipments?

A. Yes. Outbound, they would have to be brought in to us by another carrier, through either Baltimore or Philadelphia.

Q. Let's take the state of Virginia.

Virginia, during the period '54 through '57, what was the situation with respect to the transportation of explosives into points in Virginia and from points in Virginia?

A. We had this authority from Crane, Indiana, between Crane, Indiana and Yorktown and Norfolk, Virginia, which is just between those points. Now, there is a little highway, one of these marked in red, that does run down into Virginia.

Q. Marked in red?

A. Green, rather; excuse me. And if you are going over the Chicago-Kansas City-Omaha gateways, and there was a point that was on this highway, you could go to that point, but you had no other points and places -- you could not haul from points and places on this highway, nor could you haul in any other parts of the state.

Q. Let's take an example there was some reference to, Mr. Moody, the example of movement of explosives from Radford, Virginia to the Joliet Arsenal, Joliet, Illinois. In the period 1954 - 57 to what extent, if any, did Riss participate in the movement of ammunition and explosives from Radford,
1983 Virginia to Joliet, Illinois?

MR. McGLOTHLIN: Excuse me. Is this question "participated" or "authorized"?

MR. LAYNE: Authorized; I'm sorry.

THE WITNESS: It would be necessary for some other carrier to originate the movement out of Radford, Virginia, and they would haul it to us at

our nearest certificated point for service we had to Radford, or to the nearest point where we could arrange for an interchange.

BY MR. LAYNE:

Q. Do you know what that point was?

A. I believe it was Bluefield, West Virginia -- across the line in West Virginia to one of our certificated points, and Radford is not too far from West Virginia, so they had to bring it into West Virginia where it was interlined to us.

Q. When it was interlined with Riss & Company at Bluefield, West Virginia, for example -- I say if it was by some other carrier, was Riss authorized to transport ammunition and explosives from that point to Joliet Arsenal, Joliet, Illinois?

A. Yes. That being one of our certificated points, we could haul from there back to Joliet, which is one of our certificated points.

Q. Now I would like to turn your attention to some of the states
1984 that are shown on that map. Can you tell us some of the states shown on the map that are marked in pink; states: that are marked in pink, that I can see on Exhibit Number 2, are New York, Pennsylvania, Ohio, Indiana, Illinois, and Iowa. Now, I would like --

A. And New Jersey.

Q. New Jersey. I would like you to tell the jury to what extent, during the period 1954 through '57 was Riss and Company authorized to deliver shipments to points in the state of New Jersey.

A. If it didn't move over Kansas City gateway it would have to be delivered only to our certificated points in New Jersey, which is, fundamentally, this area from Philadelphia to Jersey City. We did have specified authority from Crane to Earle, New Jersey, and other than that, unless it is moved over the Kansas City gateway, we could haul from there into all points and places in New Jersey. If it is not hauled over the Kansas City gateway there would have to be named points.

Q. Can you tell the jury what are the named points Riss was

authorized to deliver shipments to New Jersey?

A. Trenton -- several in the Jersey City area -- Camden, New Brunswick, and Patterson. Generally known as the commercial area around Jersey City.

Q. You have used the term in answering my questions, about a
1985 shipment "moving over" the point of Fairfax, Kansas or Kansas City. What do you mean by "moving over" the point of Fairfax, Kansas or Kansas City?

A. That is what really is called tacking. For example, shipments given to us at Denver going to some place here in New Jersey that was not on our certificated points, they would have to be tacked by us to our authority at Fairfax, and from that point it goes on then to the place in New Jersey. I say "over" -- I mean that it would have to come through that gateway.

Q. Let me ask you, Mr. Moody: does the truck, or vehicle, loaded with explosives have to go through that geographic location -- physically go through that geographic location? A. Yes, sir.

Q. Is that what you mean when you use the term "moving over" a particular point?

A. Yes, . That is what I mean.

Q. All right, sir. I think, for the remainder of this examination, perhaps I can use Plaintiff's Exhibit for identification Number 3.

Now, Mr. Moody, I understand that that map was made from a reproduction of Plaintiff's Exhibit -- so far as the routes are concerned -- from Plaintiff's Exhibit Number 2, and you made some corrections yesterday to Plaintiff's Exhibit Number 2. You pointed out to the jury some errors in that so far as the colors were concerned.

1986 A. The same corrections should be made here as to the extent they are shown on the map. The first one is in the area right south of Pittsburgh. That should be connected up to show a through route there.

Q. Do you have a crayon so that you can make that green?

A. It is not quite the same color, but I am making it.

THE COURT: Mr. Moody, pardon me. Would you stand over there -- this way so the front part of the jury may see, if you can do it that way?

THE WITNESS: I think I can.

The highway from Chicago to St. Louis should all be green because that is a permanent authority to haul -- transport explosives to all points and places on that highway.

BY MR. LAYNE:

Q. Should all be what?

A. Red. I'm not really color blind. That should be red. I am now marking it red. The highway running into Springfield, Illinois should be red, on over to Decatur, Illinois, right there. Highway 34 coming out of Iowa should also be red -- that would be this one right here connecting up with Chenoa, Illinois. I believe that makes the corrections.

1987 Q. Does that make the Exhibit Number 3 for identification correct so far as the colors relating to the routes are concerned, to your knowledge?

A. Yes, it does.

Q. Now, Mr. Moody, there are some gold stars on that map. Do you see the gold stars on the Exhibit Number 3 for identification?

A. Yes, sir.

Q. Do you know whether or not those -- what those gold stars indicate? A. No, sir.

Q. Well, I will ask you to assume for the purpose of this examination that those gold stars indicate the locations of government installations -- government depots -- of one kind or another that may receive explosives or originate government ammunition and explosives shipments that are not on the routes shown on the map colored in green.

In my subsequent questions about those I will ask you, for the purpose of this examination, to assume that those gold stars are correctly reflecting those locations of some government installations.

Now, do you see on Exhibit Number 3 for identification gold stars

in the state of Massachusetts? A. Yes, sir.

1988 Q. I am asking you, in the period '54 - '57, whether or not Riss & Company would be authorized, or was authorized, under Sub 60-TA, to deliver shipments to those points shown, or the places where gold stars are located?

A. They could deliver there only if it was on the highway marked in green, and to the extent that the gold star reflects the place that is not on that route, then Riss & Company could not deliver direct to that point.

Q. If those gold stars are not on the routes shown in green was Riss & Company authorized to originate shipments at those points; that is, take explosives from those points going to some other place?

A. No, sir, they could not originate themselves. Coming from these points off the highway are not certificated. They would have to be brought in by an interlined carrier.

Q. Were there, however, points on the green lines in Massachusetts which Riss was authorized to transport explosives to and from during the period 1954 - '57?

A. Yes. To the places that they would have been certificated to transport general commodities, they also transported explosives -- certificated points.

Q. I call your attention to the state of New York shown on Plaintiff's Exhibit Number 3. You see some gold stars indicating locations in the state of New York on that map.

1989 A. Yes, sir; there are.

Q. I would like you to tell the jury whether or not Riss & Company was authbrized to deliver any shipments of explosives during the period 1954 - '57 to the locations shown on gold stars on that map, Exhibit Number 3.

A. Yes. They could deliver inbound by moving over the Kansas City-Fairfax gateway. They delivered to all points and places in New York. They could not pick up in New York for outbound shipments, however, unless it was certificated points in New York.

MR. SHEA: May I hear that answer?

THE COURT: Yes. Do you want the last question and answer?

MR. SHEA: I heard the question.

THE COURT: All right. Repeat the answer.

(Thereupon, the reporter read the last answer.)

BY MR. LAYNE:

Q. Were there points and places in the state of New York to which Riss was, during the period 1954 - '57, authorized to transport ammunition and explosives -- points on the green lines to which Riss & Company could transport ammunition and explosives?

A. Yes, over the other irregular route authority, that included Chicago gateway, Omaha gateway, Kansas City gateway -- or, rather, area around Kansas City -- they could go over those gateways and deliver to all points and places on the highway.

1990 Now, to transport back out, though, it would have to be a certificated point.

Q. With respect to shipments out of the state of New York, were there points which Riss was authorized to transport ammunition and explosives on movements out of the state of New York?

A. Yes; New York City; Albany, New York; Schenectady, Syracuse, Buffalo. Another little town up here by Albany -- I can't remember right now.

Q. I would like to call your attention to the Plaintiff's Exhibit Number 3 and ask you to look at the state of New Jersey. What was the situation with respect to delivering and originating shipments of ammunition and explosives during the period 1954 through '57?

MR. McGLOTHLIN: I didn't hear the question.

MR. LAYNE: The situation with respect to points and places in the state of New Jersey during the period 1954 - '57.

THE WITNESS: Moving over to Kansas City gateway we could deliver all points and places in New Jersey. Moving over to the gateways --

Chicago, Omaha, Des Moines, Iowa, the general large area around Kansas City -- we could deliver to all points and places on our routes. Going back out, we could only pick up directly, that is, points that were certificated to Riss & Company in New Jersey. Anything else would have to be interlined to Riss & Company in the general interlining point, either New Brunswick, New Jersey, or Trenton, New Jersey.

1991 BY MR. LAYNE:

Q. I call your attention, specifically, to the gold points in New Jersey. During the period 1954 - '57 was Riss authorized to deliver shipments of ammunition and explosives to the gold points indicated in New Jersey?

THE COURT: Excuse me, Mr. Moody. Would you get on the other side? Your voice will carry to the reporter.

THE WITNESS: We could, by going over the Kansas City gateway, which is out here, deliver to all points and places in New Jersey, including those that have gold stars on them.

I note another correction that should be marked green -- the highway going from Philadelphia to Jersey City, right here. (Indicating.) That ought to be green; that is not shown there as a connection, and we do have a connecting line there.

BY MR. LAYNE:

Q. Now, I call your attention to the gold points on the Exhibit Number 3 for identification in the state of Delaware -- the gold points indicated in the state of Delaware -- the gold points indicated on that exhibit?

A. Yes.

1992 Q. What was the situation with respect to originating and delivering shipments of explosives during the period 1954 - '57 to those gold points in the state of Delaware so far as Riss & Company was concerned?

A. We could not deliver or pick up in the state of Delaware. Any movements that Riss participated in in Delaware would have to be interlined with another carrier, generally, Baltimore -- Philadelphia, excuse me.

Q. What is the situation, or was the situation, during the period

1954 - '57 with respect to the gold points in the state of Maryland?

A. The gold points in Maryland seem to be off the highway, so the only thing we could deliver to would be any place on the highway certificated in Maryland. If they were not on that highway we could not deliver directly into it.

Q. What was the situation with respect to taking shipments from those gold points during the period '54 - '57?

A. Unless they were on the highway as certificated points, we could not directly pick it up. It would have to be interlined to Riss & Company.

Q. I ask you about the gold points in the state of Virginia?

A. The same with the state of Virginia except Crane to Yorktown-Norfolk area -- could go between those two points, but the other gold points in Virginia would have to be handled through interlining arrangements with another carrier, from a place in which Riss & Company was certificated.

1993 Q. I can't see from here, Mr. Moody, but let's start moving west. Let's go to West Virginia. Are there any gold points in West Virginia on Plaintiff's Exhibit for identification Number 3?

1994 A. I don't believe there are any points. There are several along over here that the State boundaries are not too well defined. But if there were some gold star points there, that was off these green highways, we would have to make an interline connection.

Q. Let's more north then to the State of Pennsylvania. Are there gold star points indicated on plaintiff's exhibit number 3 in Pennsylvania?

A. Yes, there are.

Q. What was the situation during the period 1954-57 with respect to the authority of Riss & Company to transport explosives to and from these points?

A. Over the Fairfax-Kansas City Gateway Riss delivered to all points and places in Pennsylvania. It also delivered over the Chicago-Omaha-Des Moines-Kansas City Gateways, to all points and places that are on the green marked highway. Now, that was inbound.

Transport back out, we could only transport from our certificated points for general commodities in Pennsylvania. The gold point is not at a certificated point, then an interline arrangement would have to be arranged. The other carrier would originate the movement and we would exchange and interline at one of Riss' certificated points.

Q. Could Riss deliver to the gold point in Pennsylvania?

1995 A. You could by going over these gateways that I have named, Fairfax-Kansas City Gateway.

Q. Assuming that the gold point is not at one of the certificated points of Riss & Company, for the purpose of my question, would Riss & Company originate traffic or originate shipments of explosives at the gold point?

A. For outbound, you could not.

Q. Now let's move over to the State of Ohio. Are there gold points in the State of Ohio?

A. Yes sir, there is.

Q. Did Riss & Company deliver shipments of explosives to those gold points?

A. You deliver to the gold points if they are certificated points. You could deliver from coming over the Kansas City-Fairfax Gateway to all points and places in Ohio.

You could deliver from Chicago-Des Moines-Kansas City Gateways to all points and places in Ohio that are on these green highways, these green-marked highways. That is for delivery.

Now for transporting outbound you could not transport out of Ohio, unless it is from a certificated point of Riss & Company. If it was not there, they would have to set up an interline arrangement by having it originated by another carrier.

1996 Q. Could you tell us what points were certificated, as you say, certificated points in the State of Ohio, where Riss & Company could transport outbound movements?

A. Cleveland; Akron; Toledo; Columbus; Cincinnati. There is another town down there by Columbus -- Dayton, Springfield, Steubenville, Toledo, if I didn't name it.

Q. I note that I failed to ask you what cities, what points could Riss serve during the period '54-57 in outbound movements of explosives in the State of Pennsylvania.

A. Pittsburgh and McKees Rock, several little highways from Pittsburgh down to West Virginia, all of the towns that are on that highway, the principal one being McKees Rock, Harrisburg, Philadelphia, Erie, I believe that is the principal ones in Pennsylvania.

Q. I think the most western State shown on Exhibit 3 for identification is Illinois. Are there any gold stars in Illinois?

A. There would appear to be one around, Sir, around Chicago. I would imagine this was in Illinois (indicating). I am not too sure what this point represents. But there are some in Illinois.

1997 Q. What is the situation so far as Riss & Company's authority to transport to and from those points?

A. Riss has several permanent points in Illinois, and we could transport any of our certificated points in Illinois. Namely, all of the points intermediate from Chicago to St. Louis over Route 66; and all points in Illinois, Springfield, Illinois, over to the Missouri State line, all of those intermediate points. All of the intermediate points over to Decatur, Illinois. We could go in or out on those, in that situation.

You could deliver, going over the Kansas City-Fairfax Gateway to all points and places in Illinois, regardless of whether they are on your marked routes or not.

Going over the Omaha-Chicago-Kansas City Gateway, you could deliver to all points and places that are on the highways here marked in green, -- or red either. But you could not haul back out of Illinois unless it was a certificated point, on your general commodity authority.

Q. All right, sir. Now I just have a few more questions. For that purpose I would like to show you plaintiff's exhibit number two again.

It has been pointed out that I left out the State of Indiana. I am sorry. Let's just lift that down again for a moment. Going west, I overlooked Indiana.

1998 Are there gold stars in the State of Indiana?

A. Yes, sir.

Q. What was the situation with respect to Riss & Company's operating authority to transport ammunitions and explosives to and from those gold stars in the period 1954-57?

A. Over the Fairfax-Kansas City Gateway it delivered to all points in the State of Indiana. Also, -- now that is delivery only. You could pick up or deliver at the certificated points of Riss & Company that we had in Indiana. And we had the irregular route by Crain down to Georgetown-Norfolk, Virginia.

We had also a temporary authority between Crane, Indiana, and Earle, New Jersey.

Q. Will you tell the jury what points Riss was authorized to pick up, originate explosives shipments, during the years 1954-57 in the State of Indiana?

A. We could originate only at the points that we had certificated authority for general commodities; Indianapolis, Richmond, Indiana; Gary. And in Chicago suburbs. Fort Wayne, Indiana. I believe that is about it in Indiana.

1999 Q. Now if you will put back up exhibit number two, please.

Mr. Moody, you have been referring to movements into and out of States going through Kansas City or going through Omaha or going through Chicago. Let me ask you whether or not Riss was authorized to, during the period 1954-57, to transport explosives which would originate, let us say, in Indiana, at some point in Indiana, and going to some point for example in Massachusetts or Pennsylvania?

A. Yes, we could pick up at Indiana if it was one of our general commodities certificated points; and we could deliver over to Pennsylvania if it was to one of our general commodities certificated points.

Q. Let me give you an example. Was Riss & Company authorized during the period 1954-57 to transport shipments of ammunition and explosives from Indianapolis, Indiana, to routes shown on exhibit two, to Boston, Massachusetts?

A. Yes, that is correct. They are both certificated points. That could be done.

2000 Q. Was Riss & Company authorized to transport a shipment during the period 1954-57, -- of ammunition and explosives -- from Columbus, Ohio to Boston, Massachusetts?

A. They both being certificated general commodity points, yes sir.

Q. Was Riss & Company authorized to transport in a reverse direction on those two shipments I just mentioned?

A. Yes, they could.

Q. Now I have asked you, Mr. Moody, about the authority, and you have referred in some instances to interchange or interline agreements with other carriers for interline arrangements with other carriers.

Do you know whether in the period 1957, and 1956, Riss & Company had interline or interchange arrangements with carriers so as to connect with its points at Boston, Massachusetts, to serve such a point as Hingham, Massachusetts?

* * *

2003 THE WITNESS: The first test is to have a carrier that can serve the point of Hingham in the transportation of explosives. That carrier is found and the negotiations are made about the interchanging of equipment with that carrier.

Now it being a short haul from Boston to Hingham, and a lost of explosives cannot be transferred, what it meant was the other carrier took the Riss trailer and went to Hingham with it. Quite frequently it is just a verbal agreement, that: "You take our trailer and bring it back to us. If you keep it more than a day we will charge you eight dollars a day for interchange of trailers".

In some cases they enter into formal interchange agreements, particularly with an interline carrier will be carrying your trailer a long distance. You would have a formal interchange, a trailer interchange agreement.

2004 It would happen on movements west, out of Denver, carriers coming to us, we giving, taking our trailers and we giving trailers to other carriers at Denver, you would always have a written trailer interchange agreement.

Now for little short hauls, Boston to Hingham, or Indian Head to Baltimore, there may not be a formal written trailers interchange agreemtn, because always the Riss trailer was involved. But you first talk about a trailer agreement, and you decide that that carrier will just take your trailer down there. Maybe he is not charged anything unless he has kept it more than a day.

By Mr. Layne:

Q. What person or officers in Riss & Company would negotiate this interchange agreement, negotiate the interchange agreements during the period 1954-57, with respect to the transportation of ammunition and explosvies in this connective line arrangement?

A. The Vice-President in charge of the Government Division would generally negotiate both the interline and trailer interchange agreement. The Legal Department would write up the agreement in the event that they have one to be signed. Mr. Lawrence Quinn was the man in charge, at the first part of that period.

2005 Q. Now Mr. Moody, you have again -- let's be quite clear -- is there a difference?

THE COURT: Mr. Ball can't hear you back there.

Mr. Layne, let me suggest, if you would stand back there or sit down back there, either one, but keep your voice up, if you will.

I notice Mr. Ball is having difficulty hearing you.

MR. LAYNE: I will do that, your Honor.

By Mr. Layne:

Q. Now you have again used the term "interline agreement" and "interchange agreement". Is there a difference in the interline agreement or the trailer or interchange agreement relating to the trailers?

A. Yes, they are separate transactions. To have an interline agreement you first would have to have concurrence of rates with the other carrier. It is generally accomplished through a Section 22 quotation.

But as to the division of the revenue of what he is going to charge to

haul that trailer load from Boston to Hingham, it is a metter of bargaining. Generally, that is between the carriers.

2006 Q. Now were those, the agreement as to the way in which the revenue would be divided, that is the freight charges received and divided between the carriers, were those agreements reduced to writing?

A. Some are. Mostly it is a letter form. They agree, and they are not always reduced to writing. It is oral agreements sometimes.

Q. Is there any requirement that they be reduced to writing?

A. No, there isn't.

Q. Now what officer, officers, or employees of Riss & Company would enter into such division of the revenue agreements, or division of the freight charge agreements called interline agreements?

A. Well the period being involved, '54-57, the first part would be Mr. Lawrence Quinn, until the time that he retired; and you would have possibly a man named Jim Reardon.

MR. BALL: Will you speak louder, and spell Mr. Reardon's name, so that we can have it in the record?

THE WITNESS: James Reardon, R-e-a-r-d-o-n.

By Mr. Layne:

Q. Now do you know of your own knowledge a carrier with which Riss has interline and interchange agreements, or arrangements, during the period 1956-57, let's take, from Boston, Massachusetts, Or between Boston and Higham Massachusetts?

2007 A. Yes, I do. It was the C & D delivery.

Q. "C"? Capital "C"?

A. Capital C, character and, and a capital D. "C" and "D" delivery.

Q. And do you know where, at what point would the equipment be interchanged between C & D and Riss and Company?

A. At Boston.

Q. Do you know during the period 1956-57, whether or not Riss & Company had arrangements for another interline or interchange arrangement with a carrier with respect to transportation of ammunition and explosives, to points, Indian Head, Maryland, for instance?

A. At Indian Head they used a carrier called Bailey's express. I think on occasion another one was Wooleyhan, W-o-o-l-e-y-h-a-n. I believe they used both of those carriers.

Q. The first one was Bailey's Express, B-a-i-l-e-y's Express?

A. Correct.

Q. And where was the point of interchange of equipment between Bailey's Express and Riss & Company with respect to Indian Head, Maryland, for example?

2008 A. At a place called Chaney's (C-h-a-n-e-y's) Truck Stop, at Gambrills, Maryland.

Q. You mentioned a temporary operating authority with respect to that interchange point. What was the circumstance in connection with the temporary operating authority at that interchange point?

A. Riss & Company did not have a certificated point down in Maryland, down in that part of Maryland, and the nearest being Baltimore. Well, you could not interchange that type of traffic in nor around a metropolitan area, so it was necessary to find a place that would be qualified by Interstate Commerce Commission as a proper place to park and interchange trailers. So, therefore, Riss & Company applied for and obtained temporary authority from the Interstate Commerce Commission to serve the point of Gambrills, Maryland, for the purpose of interchange of trailers and for carrying explosives. Sub Number 173.

Prior to that we had emergency temporary authority to serve the point until you formulated your necessary application and the granting of temporary authority. So the first, prior to that it was emergency temporary authority to serve the point. Then eventually Sub No. 172TA gave temporary authority to serve.

* * *

2011 Q. Now, first, Mr. Moody, I want to ask you about the period subsequent to the year 1957, and I would like to ask you whether or not Riss & Company -- for what period subsequent to 1957 did Riss and Company retain the authority to transport ammunition and explosives under temporary authority in Sub 60 TA and the temporary authority between Crain, Indiana, Earle, New Jersey, and the points in Virginia, that you have described to the jury?

2012 A. That was retained until March 1959.

Q. During the period 1954 to March, 1959, was Riss and Company's authority under Sub 60 TA, or its authority to transport ammunition and explosives between Crain and Earle, and between Crain and Portsmouth, Yorktown and Norfolk, terminated or suspended by the Interstate Commerce Commission?

A. It was not.

Q. I ask you whether during the period 1954 to March 1959 the Interstate Commerce Commission suspended or revoked or modified by deletion or taking away any of the operating authority of Riss and Company, permanent operating authority of Riss and Company, to transport ammunition and explosives, that may be reflected in the routes shown on Exhibit No. 2?

A. They did not.

Q. I would like to ask you about whether or not a petition was filed -- do you know whether or not a petition was filed by certain rail carriers to terminate the authority of Riss and Company in Sub 60 TA?

A. Yes, sir, there was.

* * *

2014 MR. LAYNE: I would like to have this marked, Your Honor, for identification. This is Plaintiff's Exhibit No. 13 for identification.

(The document was marked Plaintiff's Exhibit No. 13 for identification, ICC order dated March 25, 1959.)

BY MR. LAYNE:

Q. Now, Mr. Moody, I would like you to read to the jury the terms of that order.

MR. McGLOTHLIN: If your Honor please, I think the document should be admitted in evidence before it is read.

THE COURT: Have you offered it in evidence yet?

MR. LAYNE: I have not. I offer the exhibit.

MR. McGLOTHLIN: I object to it, your Honor.

* * *

2028 MR. LAYNE. I would like to offer Plaintiff's Exhibit 14 for identification.

THE COURT: Is there any objection?

MR. BALL: There is.

THE COURT: All right. Now we are getting somewhere.

MR. BALL: The defendants object to the offer of the examiner's report, and any examiner's report, on the ground that such reports do not tend to prove or disprove any issue. Also on the ground that neither the nature of the evidence nor the substance of the evidence nor the evidence itself which was introduced in this Sub-84 proceeding, nor any remarks or observations or summaries of that evidence by the trial examiner is competent evidence to prove or disprove any issue in the present case.

Defendants object, that the rulings of the Interstate Commerce Commission that the evidence introduced by these defendants in the Sub-84 proceedings was relevant and material to the issues of public convenience and necessity and of the lack of fitness of this plaintiff to receive a certificate to haul explosives are not subject to collateral attack in this Court.

The defendants object on the ground that the correctness of the holding of the Interstate Commerce Commission as to the weight and credibility of the evidence introduced at the ICC proceedings as to the inferences to be drawn therefrom are not subject to review by either this Court or this jury in this present case.

2029 The defendants object that the issues as to whether the public convenience and necessity justified the grant of permanent explosives authority to the Riss & Company, and as to whether Riss & Company was fit to be given such authority, are issues entrusted to the primary and exclusive jurisdiction of the Interstate Commerce Commission, and cannot become issues or be

litigated in this Court in the present proceedings.

We object to the introduction of this document on the ground that the issue as to the propriety of the conduct of these defendants in the proceedings before the ICC and the offer of their evidence is an issue solely to be determined by the Interstate Commerce Commission and is not an issue within the jurisdiction of this Court.

The defendants further object that nothing in the issues in the present case permits a retrial of this case on the issues of fact or the nature of the facts that were before the Interstate Commerce Commission in the ICC proceedings.

The defendants further object that the isolated items of evidence presented to the Interstate Commerce Commission which might happen to be referred to at various stages of this examiner's report are not in themselves admissible in this case, unless they are otherwise admissible as judicial admissions or for purposes of impeachment.

2030 The defendants further object on the ground that the reports of trial examiners are themselves mere statements of opinions or conclusions as to the substance or the purport of evidentiary facts, and are incompetent as opinion evidence and as hearsay and are not binding upon these defendants in this proceeding.

The defendants further object that to permit a collateral review in this case of the evidence presented to the Interstate Commerce Commission infringes against the constitutional rights of these defendants guaranteed to them by the First Amendment to the Constitution of the United States.

And I wish to make a further objection on behalf of the AWR and other defendants that were not parties to the proceedings before the Interstate Commerce Commission.

* * *

2035 (The ICC order and report in MC 200, Sub-84, was marked and received in evidence as Plaintiff's Exhibit No. 15)

BY MR. LAYNE:

Q. Now, Mr. Moody, I ask you whether or not in August 1949 the Interstate Commerce Commission, what did the Interstate Commerce Commission, Division 5 thereof, hold with respect to the grant or denial of the application?

2036 A. The application was denied.

Q. Do you know, Mr. Moody, do you have the files here, as to whether or not a petition for reconsideration of that order was taken by Riss & Company, the applicant?

A. Yes, sir, there was.

Q. And was that petition for reconsideration -- what happened to the petition for reconsideration?

A. It was denied.

Q. Was there a judicial action, an action to review the decision of the Interstate Commerce Commission and the order of the Interstate Commerce Commission thereafter filed?

A. Yes, sir. Riss & Company then filed a complaint in the District Court, the U. S. District Court for the Western District, at Kansas City, Missouri, for a review of the proceedings.

Q. And as a result of that review, what was the action of the District Court with respect to sustaining or setting aside the order of the Commission?

A. The U. S. District Court sustained the ICC,

Q. Can you tell me the date on which the United States District Court sustained the order of the Commission?

A. I believe that was October, 1950.

2037 Q. Now did that action have any effect so far as orders of the court were concerned as to the operations of Riss & Company under its temporary authority in Sub-No. 60 TA to transport explosives?

A. Yes. Up to that point there had been a restraining order in existence. And when the U. S. District Court came out with their finding in October, 1949, then the application of Sub-84 having been denied, all of the various temporary authorities that were maintained and kept in existence because of the pending application to make permanent, they also fell at the same time, and therefore were revoked.

MR. GATES. Your Honor, may I ask what notes of his Mr. Moody apparently has before him and is reading from?

THE COURT. Do you have some notes you are reading from, Mr. Moody?

THE WITNESS. Your Honor, I do not. I have before me Plaintiff's Exhibit No. 15, which was the decision of the ICC decided August 10, 1949.

THE COURT. What you have just testified, was that from your own knowledge?

THE WITNESS. Yes, it is.

THE COURT. All right.

MR. GATES. Thank you very much.

2038 THE COURT. He thought you had a paper you were reading from.

BY MR. LAYNE:

Q. Was there thereafter an appeal taken from the -- was there further judicial action with respect to that decision?

A. Yes, there was.

Q. What was that judicial action?

A. An appeal was taken by Riss & Company to the United States Supreme Court, and they accepted the case and proceeded to hear it. In April 1951 the United States Supreme Court issued a restraining order.

* * *

2039 Q. Mr. Moody, do you know the basis of the litigation in connection with the Commission's order and the questions presented to the Supreme Court of the United States in that connection?

A. Yes, I do.

Q. Well would you give us a very short explanation?

A. The basis for the appeal of Riss & Company was in regard to the qualifications of the hearing examiner who was appointed to hear the Sub-84 applications. Objections were made at the time of the hearing before the examiner. And therefore that was the basis for the court appeals. And the final conclusion, when decided by the United States Supreme Court, was that the hearing examiner was not a qualified hearing examiner, according to the Administrative Procedure Act. That was the basis for reversal of the United States District Court.

* * *

2041 Q. (Having handed exhibit to the witness) By reference to Plaintiff's Exhibit No. 11, can you tell me what was the result of the reversal by the Supreme Court of the District' Court's decision?

A. The result was that when the Supreme Court on April 16, 1951 issued its decision to which I referred, reversing the United States District Court for the Western District of Missouri, that the ICC then on April 26, 1951 ordered all prior proceedings and orders in the docket designated as Sub No. 84 be set aside. And therefore, they further stated, that the Commission's order of April 19, 1950 purporting to terminate the temporary authorities issued to Riss & Company, in Docket Nos. 34, 35, 40, 41, 42, 60, 62, and 63, the temporary authorities, that they are rescinded, and the said temporary authorities be continued in effect.

The date of that order was April 26, 1951.

2042 Q. Thereafter, Mr. Moody, was the application in MC 200, Sub No. 84, for permenent authority assigned for hearing?

A. Yes. The Interstate Commerce Commission then assigned, de novo, or I mean for rehearing, or new hearing, Sub-84 applications. That was assigned for hearing September 21st, 1951.

Q. And were hearings held with respect to that application?

A. Yes. There were hearings held in Chicago and Washington, D. C., covering a total heearing period of 50 days -- 50 days' actual hearing dates.

MR, LAYNE. I would like to have marked as a plaintiff's exhibit report and order recommended by B. E. St illwell, Examiner, in Docket MC 200, Sub No. 84, and certain other proceedings, served April 24th, 1953.

MR. BALL. The defendants object to the examiner's report for the same reasons that I have previously stated for our grounds of objection to the examiner's report.

THE COURT. Let me see that, just the title of it. (It was handed up.) I will make the same ruling.

MR. BALL. The ruling -- there was no ruling before.

THE COURT. I thought I had made a ruling on it.

MR. BALL. I thought you had asked him to withhold the document.

2043 THE COURT. All right, I will make a ruling now and overrule the objection.

THE DEPUTY CLERK. Plaintiff's exhibit 16 for identification.

(The ICC examiner's recommended report and order, April 24, 1953, was marked for identification as Plaintiff's Exhibit No. 16.)

* * *

MR. LAYNE TO THE COURT DURING DIRECT EXAMINATION OF MR. MOODY

2102 MR. LAYNE: I offer Exhibit No. 17.

THE COURT: It may be received subject to the same objections.

* * *

2134 DIRECT EXAMINATION OF MR. IVAN W. MOODY

BY MR. WRIGHT:

MR. WRIGHT: I will ask to have marked for identification Plaintiff's Exhibit 23, a report proposed by Walter D. McCloud, dated or filed August 27, 1956, in numbers MC-1413 and MC-1783.

Q. And I ask you if this is the report you were referring to?

A. Yes, sir.

MR. WRIGHT: I will offer this.

MR. BALL: Defendants object to this for all the reasons stated to the two previous offers of examiner's report. And in this case especially object to this because this particular examiner's report is replete with opinions and conclusions and comments of the trial examiner in every which respect the trial examiner was later reversed by the Interstate Commerce Commission.

* * *

2156 (Document, Corrected Order Number MC-200 Sub. 197 TA, dated September 4, 1958, was marked Plaintiff's Exhibit No. 30, for identification.)

THE COURT: Mr. Wright, will you state the purpose for which you are offering that exhibit in evidence.

MR. WRIGHT: The purpose is to contradict what has been asserted here by the defendants that the Commission in September 1957 in effect found Riss & Company unfit to perform either explosives service or other service. The fact is, of course, there was no such finding and we propose to show that the Commission itself did, after that September 1957 report, grant Riss -- not only did it leave in effect the temporary authority shown there but it granted to Riss additional temporary authority to carry ammunition and explosives.

THE COURT: Mr. Wheeler.

MR. WHEELER: I think it is a question of how you characterize the Commission's order. The 1957 order say on its face that they found them unfit. They found that they had engaged in a willful course of conduct to violate the Commission's safety rules, and they ordered them to cease and desist from it. It is plainly stated in the order. What this has to do with that order, I don't know.

2157 THE COURT: Just a minute. What was this additional order granted that sets forth in Plaintiff's No. 30, MC-200 197 -- Is that it?

MR. WRIGHT: Yes, this is Sub. 197 TA.

THE COURT: Won't it speak for itself?

MR. WRIGHT: Yes, I was going to offer it and read it. It's a short order, two pages.

THE COURT: All right. Now, everybody has an objection. I'll hear one at a time. Mr. Ball.

MR. BALL: Speaking for my particular defendants, we have no objection to the introduction of this but I do want to correct the statement made by Mr. Wright that when a temporary authority is issued, there is no hearing or finding upon fitness and this was merely issuance of a temporary authority.

THE COURT: I think that the jury understands that.

MR. WRIGHT: I made no such statement. I propose to go on and show that you have a hearing when you are trying to convert a temporary into permanent authority.

2158 THE COURT: I think in view of the fact it is only a page or two, we had better have it read to the jury at the proper time.

Mr. Wheeler.

MR. WHEELER: Your Honor, there may be some purpose for which this may be admitted into evidence, but it certainly cannot be admitted into evidence to prove that the Commission by this action, by issuing this order, changed or modified in any way an order which continued in effect at the very time and subsequent to the date of this order.

THE COURT: Well, I don't think it is being offered for that purpose.

MR. WHEELER: Well, that's what he says he is offering it for.

THE COURT: Suppose you state your purpose again for which you are offering it into evidence.

MR. WRIGHT: The purpose for making the offer was to show that contrary to the impression that Mr. Wheeler has just sought to convey and that other defendants' counsel have sought to convey, the Commission instead of finding Riss unfit actually in fact what he claims was such a finding gave Riss additional authority to perform this explosives transportation.

THE COURT: All right. Now, the document will speak for itself. I understand your objection, Mr. Gates. I am going to admit the document.

2159 MR. GATES: May I take an exception? May I also make one suggestion, if the Court please?

Mr. Wright has had the witness read Plaintiff's Exhibit No. 25. Now, in the fourth paragraph of that report, it refers to the findings of fact and conclusions which the Commission in its opinion, which is Exhibit No. 24, incorporates by reference. Now, I think it is only fair, if the Court please, that Mr. Wright be required in connection with this discussion, in order that it be before the jury in proper context, that he should be required to read to the jury the findings of fact and conclusions of the Commission on September 16, 1957, and then let the jury decide if that seems to be the Court's desire as to whether or not the Commission in this order, this temporary authority No. 197 in fact did overrule or modify or change its decision of September 16, 1957.

THE COURT: Well, if it's in evidence, either party could read it. If you want to read it on cross-examination, you may.

MR. GATES: If the Court please, I think it might mislead the jury; that's all.

THE COURT: I don't think it will mislead the jury.

All right. Mr. Wheeler.

2159-A MR. WHEELER: Your Honor, I just don't understand this because Mr. Wright himself has just gotten through putting in defendant's Petition for Immediate Termination of Proceedings the reply of the Bureau of Inquiry and the Ohio's reply, which were stipulated, and the railroads' reply. And his witness has testified that the Commission has not acted on that yet.

THE COURT: Well now, you see here again, members of the jury, when the Court makes a statement it is not done for the purpose of trying to influence the jury one way or the other. After all, we can't keep sending the jury out every two minutes. We have got to discuss certain matters in the presence of the jury. So anything that I might say in connection with this, shouldn't have any bearing on this one way or the other because you are the sole judges of the facts and the evidence in the case.

But you see this is what happens: We try to save some time by not reading all of these exhibits. When we try to save time, there is a certain amount of confusion that developes.

Now, if the jury had the benefit of hearing all of the second Examiner's Report -- I am talking about the last Examiner's Report -- even though it's rather lengthy, they have had the benefit of hearing the Commissioner's report, which is the final report, the jury would have gotten the picutre of the nature of the evidence, which is one of the reasons why I admitted the first Examiner's Report, and the Commission Report and the second Examiner's Report and the Commission Report. The jury doesn't know what's in them. Now, that's the problem.

2159-B MR. WHEELER: The point that I wanted to make, Your Honor, was simply this: What Mr. Wright has said a few minutes ago and the witness has testified that these proceedings, the Commission has not acted on their decision, on their petition to terminate these proceedings in MC-C-1413. Now he comes along and says, "I am introducing this document to show that they did."

How can he say in one breath that they have't done it and in another breath that they did change their mind as to the decision of the Commission in 1957? As a matter of fact, the document he is introducing now, I don't think is in that proceeding; I think it has a different docket number.

THE COURT: This will be the ruling of the Court: The second Examiner's report and the decision is in evidenc. If counsel for the plaintiff wants to read any part or all, he may do so. If he doesn't want to do it, counsel for the defendants may do it as part of their case on cross-examination.

* * *

2160 Q. Mr. Moody, would you please read Exhibit 30?

A. May I inquire, do you want the order or the first sheet also?

Q. I would read both the order and the appendix.

A. This is called a corrected order. "At a session of the Interstate Commerce Commission, Temporary Authority Board, held at its office in Washington, D. C., 4 September 1958..".

(The witness continued reading the exhibit, ending with, "It is further ordered that except as herein granted the said application be and hereby is denied by the Commission Temporary Authority Board. Harold D. McCoy, Secretary.")

MR. WHEELER: May we approach the bench, Your Honor?

THE COURT: Yes.

(Thereupon, counsel approached the bench and the following occurred:)

MR. WHEELER: Your Honor, Mr. Wright has stated his purpose in having this document introduced in evidence and read to the jury was to show that the Commission had altered its determination.

2161 MR. WRIGHT: That is not so.

THE COURT: Give him a chance.

MR. WHEELER: In its order in Docket MC 1413; that, under I. C. C. practice and under I. C. C. rules and regulations is not correct.

I, therefore, request that the Court instruct the jury to the effect that this order did not modify, in any way, the Commission's prior finding in Docket MC 1413 that Riss should -- I would like to get that. Just a moment.

(There was a pause.)

MR. WHEELER: (Continuing) that Riss is not presently in compliance with the Interstate Commerce Act or with the rules and regulations prescribed by this Commission relative to the qualifications and the maximum hours of service of employees and safety of operation and equipment.

THE COURT: All right. Let me hear Mr. Wright.

MR. WRIGHT: Mr. Wheeler has misunderstood the purpose of my offer. I did not in any way suggest that this order modified any prior order of the Commission. I think it is important for our purposes to distinguish and I want to distinguish clearly the difference between what the Commission did in the form of orders and what it may have said in the form of findings, conclusions, and discussions. I insist that what is important, what is determinative here is not anything the Commission may have said in the course of a discussion, what it said it might do or threaten to do. What is significant is what the Commission did by order. That is what I am proposing to show.

2162 MR. WHEELER: As I understood your statement as to the reason you were offering it, was to show by issuing a temporary authority the Commission had changed its view with respect to Riss' fitness, as that view had been expressed in its report and order in 1413.

MR. WRIGHT: The '57 order spoke in no sense, right on its face, of any permanent expression and Commission view about Riss. It was held open. The view obviously did change at time progressed.

I think it is perfectly clear if, as of this date, the Commission thought Riss was not in compliance it would not have granted this order.

MR. WHEELER: The Commission does not take into consideration the fitness in this sense when it issues a temporary authority. It is only when it issues a permanent authority.

THE COURT: Wait a minute. I think I understand you. You can bring all of this out on cross-examination, can't you?

MR. WRIGHT: I am going right into what the Commission did.

2163 MR. WHEELER: It is not a question of what the Commission did. It is the purpose he stated for the reason for this. The only reason he stated, this was relevant. It was a document after the time he complains he was hurt. He said the only relevancy this showed the Commission was backing away from, by its action, from its determination contained in 1413.

THE COURT: I will let him proceed.

MR. WHEELER: May I have an exception, Your Honor?

THE COURT: Yes.

* * *

2165 THE DEPUTY CLERK: Plaintiff's Exhibit 31, for identification.

(Thereupon, proposed report and order dated March 31, 1959, MC 200, Sub 198, was marked Plaintiff's Exhibit No. 31 for identification.)

MR. BALL: The defendants make the same objection to this as to the others.

THE COURT: Your objection will run to this. I mean, all defendants.

MR. BALL: You understand, I want to repeat all objections made to prior Examiners' reports, including --

THE COURT: That will apply to this report also.

* * *

2167 Q. Is this document, sir, labeled MC 200, Sub 198, Riss & Company, Inc., Extension-Explosives, decided August 17, 1959, the Commission decision you have just referred to?

A. Yes, sir.

MR. WRIGHT: I will ask to have that marked for identification with the next plaintiff's number and I offer it in evidence.

MR. GATES: I have an objection, Your Honor.

THE COURT: Same ruling.

THE DEPUTY CLERK: Plaintiff's Exhibit 32 for identification.

(Thereupon, document entitled Interstate Commerce Commission, MC 200, Sub 198, was marked Plaintiff's Exhibit No. 32 for identification, and received in evidence.)

* * *

2171 THE DEPUTY CLERK: Plaintiff's Exhibit No. 33 for identification.

THE COURT: It will be received over objection of counsel.

(Thereupon, Order identified as No. MC 200, Sub 199, T.A., was marked Plaintiff's Exhibit No. 33 for identification, and received in evidence.)

* * *

2173 MR. WRIGHT: I will ask that be marked the next plaintiff's exhibit number and offer it in evidence.

MR. BALL: The objection will be here not only to the line of examination but the Examiner's report.

THE COURT: That's right. It goes to the entire report.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 34 for identification.

THE COURT: It may be received over objection.

(Thereupon, document headed MC 200, Sub 200, Riss & Co., Inc., Extension - Bristol, Pa., was marked Plaintiff's Exhibit No. 34 for identification and received in evidence.)

* * *

2174 THE DEPUTY CLERK: Plaintiff's Exhibit No. 35 for identification.

THE COURT: Subject to the same objection, it will be received.

2175 (Thereupon, order of Interstate Commerce Commission dated November 18, 1959, was marked for identification as Plaintiff's Exhibit No. 35 and received in evidence.)

* * *

REDIRECT EXAMINATION OF MR. RICHARD R. RISS BY MR. WRIGHT

2777 MR. SHEA: * * * Now, if the Court please, what does this document show? A meeting was called by a representative of the General Services Administration. This representative sought to get an agreement from the traffic associations that if they made a Section 22 quotation to a single agency of the Government, it would be available to all the other agencies of the Government.

2778 Response was made that these Section 22 quotations were offered in special circumstances, particular circumstances, regarding specific traffic, and that no general rule could be adopted of this kind for that reason. There was an observation that Hayghe was apparently upset because of critical comment by Congress. In the end, Hayghe says, well, won't you do the best you can about it.

Then there was brought up in the discussion and discussed at length the competitive situation between the trucks and the rails.

* * *

2785 Now, the only way that they can, or that this would be admissible, as far as I can see, would be if they could establish an agency, that Kerr was an agent for the roads that they wanted it to be made against, or an

agent authorized to make an admission of an intent to monopolize the transportation of ammunitions traffic, and there has been no import in that regard.

Now, we ought not to start out with an initial document which can obviously be highly prejudicial if the jury gets some notion that it begins to establish anything of the kind that Mr. Wright seeks to use it for, and I think that Mr. Wright out to be told that you are not going to admit this at the present time until he can lay a foundation for it. That is a different matter. But it should not be admitted until he lays some reasonable foundation for its admission. He has layed none at the present time.

2786 THE COURT: Mr. Wright, let me hear from you. I have read the reasons you gave, but you don't go into detail, of course. You state the document will be offered to show the illegal purpose of the defendants' conspiracy. The conspiracy is more fully set forth in our memorandum addressed to the admissibility of this document, previously served.

Well, I have read that, and now will you go into a little more detail? Just summarize in a brief way your contention as to why it is admissible, and what supporting proof, if any, you might offer to show agency or connection between the Southern Freight Association and the southern railroads.

MR. WRIGHT: That is what I want to address myself to first.

THE COURT: The evidence that you expect to offer.

MR. WRIGHT: We do propose, in connection with this offer to read into evidence the interrogatory questions and answers that we set forth in the memorandum which accompanied all of these documents. Now, at the discussion under Document No. 3 of that memorandum, that referred to these interrogatories, and I will read exactly what it says.

2787 It says: This document will be offered with the following interrogatories served September 12, 1955, and answers of the Atlantic Coast Line Railroad, the Southern Railroad, and the Seaboard Airline Railroad.

These are the questions and answers we would read to the jury in connection with this offer which we believe makes the document admissible against those railroads.

Interrogatory No. 22 says: "What if any association of railroads did you belong to during any of the years 1950 through 1954, which concerned themselves with publicizing the activities of long distance truckers, such as Riss & Company or of legislation or litigation involving such truckers?"

Now, the answer of the Atlantic Coast Line October 21, 1955, includes, among others, the Southern Freight Association.

There is a similar answer with respect to each of the other two railroads in response to our interrogatory No. 22, and each of them named the Southern Freight Association, and Mr. Kerr, of course, the author of the document, is the Chairman of the Southern Freight Association.

Then the next interrogatory is our No. 30, which says: State the name and address of each of your directors, officers or employes who acted as a director or officer of any of the associations named in response to the above interrogatory No. 22, during which he served each such association in the capacity in which he served.

2788 Then it appears in the Atlantic Coast Line answer that Mr. Fields, its Vice President, was a member of the Executive Committee of the SFA during the time that this document was prepared.

And it appears in the Southern answer that Mr. Oliver, its Vice President, was also a member of the Executive Committee during this period, and that Mr. King, another vice president--no, he was the president later--and that part need not be read in connection with this particular document. I note that is a later time.

Then with respect to the Seaboard Air Line, its answer to interrogatory No. 30 states, that G. B. Rice, who was vice president of Seaboard, was a member of the Executive Committee of the Association during the period.

Then another interrogatory that we propose to read and the answer of these railroads in connection with this document is No. 33, in which we ask: State whether you or anyone acting in your behalf has ever objected, either to the policy program or the means of executing the program of any association named in response to interrogatory No. 22, with respect to

competition with interstate motor carriers, and if so, state whether such suggestions were oral or in writing.

2789 And we would then propose to read the answer of each of those railroads to that interrogatory, and it says, the Atlantic Coast Line says, that it may have been during the five-year period, 1950 through 1954, that there was some objection on the part of Atlantic Coast Line Railroad Company to some policy program or the means of executing the program by one or more of the associations named in response to interrogatory 22, with respect to competition with interstate motor carriers, but no particular objection can now be recalled.

A similar answer was made, which will be read, with respect to this interrogatory by the Southern; and the Seaboard Airline simply says: So far as an examination of the files and records of the Seaboard discloses, no.

2790 Now it is perfectly clear, from those answers, that these railroads against whom the document is being offered were not only members of this association but represented on its executive committee and Mr. Kerr was as chairman of that association clearly acting at this meeting, and for that matter anything else he did, on behalf of those particular railroads. He has no other function. As Mr. Gates pointed out in his opening, these associations do not make rates for themselves; they make them for their railroad members. They are a service organization, a vehicle for doing what the railroads want done.

And right on the first page of the document, which is the letter from Mr. Kerr to Mr. Fitzpatrick of the defendant Traffic Executive Association, which also went to Mr. Dana of the Western Traffic Association, Mr. Kelly of the AAR, this whole purpose in writing this of course was to call this situation to the attention of his principals. And of course his principals were necessarily these railroads. He had no other principals.

So that I think it is perfectly clear that as to Mr. Shea's clients the necessary foundation is laid by those interrogatories.

Now his suggestion that before anyone can offer evidence of an intent to monopolize he must show that the agent or executive who makes the statement

2791

relied on has express authority to make such an expression of illegal intent, I submit it is sheer nonsense. I know of no antitrust case where evidence of intent was offered and received where the offering party was able to prove that the executive or the agent who made the statement relied upon had been expressly authorized to make a statement which indicated an intent to violate the antitrust laws, an intent to monopolize. That is just a very unrealistic view of the law of evidence, and I think there is absolutely no doubt whatsoever as to the admissibility of this document against Mr. Shea's client.

* * *

REDIRECT EXAMINATION OF MR. RISS BY MR. WRIGHT

OBJECTION BY MR. BALL (OUTSIDE THE PRESENCE OF THE JURY)

2798 AWR and Western Railroads object to Plaintiff's Exhibit 40, which is the letter of transmittal on the grounds of hearsay and irrelevance and more specifically on the following grounds:

First, that the author of the letter was not an employee of any of these defendants or of any other defendant herein.

Second, that the letter was not addressed to any of these defendants or to any employee of these defendants.

Three: That the letter contains statements of opinions and conclusions of the author thereof which are in no way binding upon any of these defendants.

Four: That the addressing of this letter as a matter of information to the addressees thereof is not evidence of any concert of action or conspiracy or improper or unlawful action on the part of such addressees.

Five: That nothing in this letter is in any way inconsistent with the existence of a proper and lawful motive for joint action and hece constitutes no competent evidence to support any issue in this case.

Six: That members of an unincorporated association arenot responsible for the activities of the employees of the association of which the members had no knowledge and are not shown to have ratified or authorized.

2799 Now, this is addressed to the covering letter of Mr. Kerr to Mr. Fitzpatrick which I have identified as 40-A, and I am not sure whether a split has been made between 40-A and 40-B.

MR. WRIGHT: It is a six-page document which simply bears the mark Plaintiff's Exhibit 40.

MR. BALL: The objections which I have just stated are addressed to the covering letter alone.

Then as to the memoranda attached to the covering letter, AWR and the Western Railroads object to the introduction of the memoranda attached to the letter of March 13, 1950, on the grounds of hearsay and irrelevance, and more specifically on the following grounds:

First, on all of the grounds stated as to the covering letter.

Second, that the document shows on its face that the meeting of March 10, 1950, was called by representatives of the Government and that the parties attending were selected by the Government, so that this document does not constitute evidence of any concert of action on the part of any of the defendants.

Third, that there is no showing that Mr. Dana of the WTA or Mr. Kelly of the AAR, or any other person present at this meeting was an employee or agent of any of these defendants or was acting within his actual ostensible authority of such an agent or employee.

2800 Four: That there is no showing that either Mr. Fitzpatrick or Mr. Kerr was in any way an agent or employee of any of these defendants or was in any way authorized to speak or act for any of these defendants.

Five: That no remark, statement or announcement of position having any evidentiary value in this case whatsoever was ascribed either to Mr. Kelly or Mr. Dana.

Six: That the remarks of Mr. Kerr as reported by this letter are not binding upon these defendants or competent as evidence against these defendants.

Seven: That the comments of Mr. Kerr as to the purpose or intention of inquiries exchanged by those in attendance at the conference are matters of opinion and conclusions and they are not competent against these defendants.

Eight: That references to Mr. Kerr's memorandum as to what was said at a prior conference are entirely incompetent since the record is silent as to the date of such conference or who was in attendance and these references are doubly hearsay as to these defendants.

Nine: That this document contains reference to matters which Mr. Kerr states he, quote "heard," or "developed," unquote, but which were not the subject of any discussion at the meeting of March 10, 1950, and thus doubly hearsay and incompetent as to these defendants.

2801 Ten: That the memorandum contained statements of purported fact by Mr. Kerr, the source of which is not disclosed by the memorandum and which are not shown to have been made at the conference, and such statements of fact by Mr. Kerr are not competent as to these defendants.

Eleven: There is no evidence that this memorandum was either brought to the attention or came to the knowledge of any of these defendants.

Twelve: That nothing in this memorandum is in any way inconsistent with the existence of a proper and lawful purpose of joint action and hence the memorandum does not constitute competent or substantial evidence of the existence of a conspiracy.

Thirteen: That nothing in this memorandum is in any way inconsistent with the exercise of independent judgment by these defendants or in any way inconsistent with the absence of any agreement between these

defendants and other defendants for joint action and hence does not constitute competent evidence of membership by these defendants in any conspiracy.

Thank you.

THE COURT: I think that covers all the objections anybody could raise.

2802 Mr. McGlothlin?

MR. McGLOTHLIN: Your Honor, when I was last on my feet I said that in view of the fact the document would not now be offered against me I would not make any objections. It occurs to me, however, I assume when the time comes there will be a mass offer of all documents ahead of time against all defendants. So the record will be better preserved if I will now state the objections I have to this particular document.

I join in many of the objections, of course, that the other people have made but since they are tailored necessarily to their clients mine have to be a little bit different.

Specifically, I object to the introduction of this document as against the Pennsylvania Railroad, the Erie Railroad, and the Baltimore and Ohio Railroad, on the ground that it is at best a narrative statement of a meeting, containing much opinion. The writing of this document is not an act in furtherance of any conspiracy, of any combination, no matter when and how established. Therefore, under the ordinary laws of evidence it is not admissible in connection with any conspiracy.

Secondly, the combination which is stated as being indicated by this document in plaintiff's papers is not the combination upon which the plaintiff in his opening statement says he intends to rely. Plaintiff in his opening statement, as I recall it, said he was going to show a combination to drive his client out of the explosives business. There is no relevancy whatever between this document and that conspiracy, regardless of what the relevancy it may have to other combination.

2803 Next, I object on the ground that the only connection that could possibly come to my clients is that a member of an association, or rather

an association to which they belong, received it. And I object on the ground that receipt of the document does not in any way attach the document to you, to the recipient.

For example, if I received a letter from a friend of mine, or from Margaret Sanger, saying a lot of us advocate birth control, that cannot be offered against me to prove I advocate birth control. Anybody can send me any letter, but it is nothing probative as to my feelings.

In this case it is once removed. There is no showing, there will be no showing, that TEA is authorized to receive letters and to take commitments as to what other people say in letters sent to TEA, on behalf of my client.

I am purposely not arguing these, Your Honor. I am just noting them.

Finally, I join, of course, in the arguments that this is hearsay. It is as a matter of fact double and triple hearsay; double and triple hearsay sullied by opinion, which Your Honor I take it has heard all the arguments.

2804 MR. RHODES: If Your Honor please, I do not want to make specific objections in behalf of E. R. P. C. but I wish to join in those already made by Mr. Shea, Mr. McGlothlin.

THE COURT: I think the record is clear when one counsel makes an objection and states his reason, all counsel have the benefit, or all defendants have the benefit of that objection. Unless there is something new you want to add to what the objecting attorney stated.

MR. McGLOTHLIN: I have one request, if Your Honor will consider it. And that is in ruling on the proffer, whichever way you rule, if Your Honor would state the basis for his ruling, it would be helpful to all of us in future arguments, I am sure.

THE COURT: I think under the issues in the case that this exhibit ought to be admitted. That is as far as I am going to go.

* * *

2807 MR. PIERPOINT: Your Honor, could I just get on clarification?

THE COURT: Yes.

MR. PIERPOINT: The objection of one counsel going for all parties, I wanted to get it absolutely clear, even though one counsel addresses his objection in terms of his specific client, that that objection nevertheless, and regardless on whose behalf it is expressly made, carries over to anybody else's client who is similarly situation.

THE COURT: I think so. You do not have to give the reasons for your objections; or you can make an objection. You could give any reason on appeal that you desire to give, why the objection should have been sustained. However, if you wish to elaborate, you may.

* * *

2808 (Thereupon the jury entered the courtroom.)

THE COURT: Mr. Wright, are you ready to proceed?

MR. WRIGHT: If the Court please, I have had marked for identification as Plaintiff's Exhibit 40, a six-page document which came from the files of the defendant Traffic Executive Association, Eastern Railroads. The first page is a covering letter from J. G. Kerr, Chairman of the Southern Freight Association, to Mr. J. J. Fitzpatrick, Mr. W. H. Dana, and Mr. W. J. Kelly.

The next five pages are a memorandum by Mr. Kerr dated March 11, 1950, which refers to a conference in Washington, D. C., on March 10, 1950.

This document is being offered against the Traffic Executive Association, Eastern Railroads, of which Mr. Fitzpatrick, one of the addressees, was then chairman, and against the railroads represented by Mr. Shea, the Southern Railroad, the Seaboard Air Line Railroad, and the Atlantic Coast Line Railroad.

And in that connection I desire to read the interrogatory answers of those three railroads in connection with the offer.

THE COURT: All right. Before you do that I wanted to read this statement of the law regarding conspiracy again. I have already alluded to

this before during my preliminary charge to the jury, you will recall, the opening day of the trial.

2809 Ladies and gentlemen of the jury: As you have heard Mr. Wright state, he has offered into evidence and the Court has permitted this exhibit, or will permit the exhibit to be read to you. This is a memorandum and I will not describe it again. You have heard Mr. Wright describe it. Mr. Wright is offering this against the defendant TEA, Southern Railroad, Seaboard Air Line, and Atlantic Coast Line.

In connection not only with this document but every other document, or documentary evidence, or statement of witnesses that might be made in this case, I want you to keep in mind constantly, every time an exhibit is offered, I want you to keep this principle of law in mind, as to the conspiracy law.

Now, in regard to this statement, or this memorandum or letter, I wish to instruct you concerning your consideration of this document.

As I told you earlier, a conspiracy is an agreement between two or more persons to accomplish a lawful objective by unlawful means, or to accomplish an unlawful objective by lawful means.

Now, ordinarily the law holds a person liable only by reason of his own acts, or declarations, and this document therefore would constitute evidence only against the defendant on whose behalf it was written. But where two or more persons conspire, each conspirator is considered to be the agent of the others, and the acts and declarations of each conspirator are attributable to all of the other conspirators, if the acts of declarations were made during the existence of the conspiracy and for the purpose of furthering the conspiracy.

2810 Before this exception to the ordinary rule can apply, however, the plaintiff must prove by independent evidence, admissible as such, against the other defendants that such defendants participated in a conspiracy with the defendant on whose behalf the document was written. However, once this conspiracy has been established a person may be held as a conspirator, although he joins the unlawful plan at a point in time far beyond the original acts of the conspirators. If he joins later, knowing of the unlawful plan, and

acts in concert with the original conspirators, he may be held responsible not only for everything done in furtherance of the conspiracy that may be done thereafter but also for everything done in furtherance of the conspiracy which has been done prior to his adherence to the unlawful plan.

To illustrate the application of this rule, I will give you a simple example in a situation not related to this case. This example has been suggested to the Court by one of the attorneys in the case and the Court thinks it is a good example so that you will be able to better understand this legal rule. I have already stated this to you before but there has been a lot of testimony in this case and evidence. I am going to restate it at this time.

2811 Suppose three persons, whom I shall call A, B, and C, are charged with a conspiracy to rob a bank. Suppose, further, that a letter written by A to B is introduced into evidence and this letter states that A has obtained three guns to be used by A, B and C in carrying out their plan to rob the bank. This letter could be considered by the jury as evidence that A entered into a conspiracy to rob the bank and had obtained three guns for that purpose. But the letter, standing alone, could not be considered as evidence that either B or C had participated in a conspiracy to rob the bank, or that the guns had been obtained for their use in that regard.

However, if the jury were convinced from other evidence, admissible against B or C, that B or C had participated in a conspiracy to rob the bank with A, then and only then would the letter written by A be admissible against B and C as well.

I am admitting the exhibit referred to in evidence at this time, therefore, only as evidence against the defendants enumerated by counsel.

2812 Remember this: Now only if the existence of the conspiracy, and its unlawful purpose, and the participation in that conspiracy by some or all of the defendants is established by independent evidence, separate and apart from this document, would this document be admissible against some or all of these defendants.

I will explain these circumstances to you later in greater detail.

It is the jurors duty to give to this document the weight you think

it is entitled to, if any.

Now counsel will read to you statements in the form of what are called answers to interrogatories. A written interrogatory is a question submitted in writing to an opposing party or to any other person and to which that party or the person makes a written answer. The answers to these interrogatories, if allowed into evidence by the Court, are then evidence in the case.

You may proceed.

2813 MR. WRIGHT: The questions and answers I am about to read to you relate to the relationship of the Southern Railroad, the Seaboard Airline Railroad, the Atlantic Coastline, to the Southern Freight Association.

The first interrogatory is Number 22, which was addressed to each of them, and said--

MR. BALL: If the Court please, I am wondering, since the name of Southern Freight Association has been mentioned, if Mr. Wright would for the jury--

THE COURT: I will tell the jury that myself, Mr. Ball.

The Southern Freight Association, which is the letterhead upon which this letter is written, is not a defendant in this case. The jury will understand that.

MR. WRIGHT (continuing): Interrogatory number 22, which was addressed to each of these railroad defendants I just referred to, asks:

(Thereupon Interrogatory 22 was read by counsel, and the Answer was related as follows:)

The answer of the Atlantic Coastline was that "Southern Freight Association is named among other associations".

The answer of Southern Railways also named the Southern Freight Association, as did the answer of the Seaboard Airline, to that interrogatory.

2814 The next one I am going to read to you is the Plaintiff's Interrogatory Number 30, which reads as follows:

(Whereupon Plaintiff's Interrogatory Number 30 was read:)

The answer of the Atlantic Coastline is:

(Whereupon the answer of the Atlantic Coastline was read:)

The Southern Railway answered:

(Whereupon the answer of the Southern Railway was read:)

And the Seaboard Airline answered:

(Whereupon the answer of the Seaboard Airline was read:)

Then they were asked in Interrogatory Number 33:

(Whereupon Plaintiff's Interrogatory Number 33 was read:)

(Whereupon the answers of the Atlantic Coastline, The Southern Railway, and the Seaboard Airline were ready to Interrogatory Number 33:)

* * *

2818 MR. BALL: The AWR and the Western Railroad defendants object to the introduction into evidence of this correspondence marked exhibits 41 and 41-a as hearsay, as irrelevant and incompetent, and more specifically for the following reasons:

One, for the reason that these documents do not refer to Riss & Company, apart from all other pending motor carrier applicants for explosives authority, hence it cannot constitute any evidence of any activity directed against the plaintiff;

Second, for the reason that the documents themselves refer no more than to plans for the effective defense of the legitimate interests of the railroads in such pending applications for authority, and hence do not constitute evidence of any improper purpose or motive on the part of any of the defendants;

Third, for the reason that the mere participation of the defendants, either jointly or severally, in such Interstate Commerce Commission proceedings was neither unlawful in itself nor evidence of the existence of an improper motive or an improper concert of action of an unlawful conspiracy;

2819 Fourth, for the reason that the mere participation of the defendants in the joint preparation of the railroads case does not constitute evidence of an illegal conspiracy, nor of membership of any of these defendants in any illegal conspiracy;

Fifth, for the reason that these documents are in no way inconsistent with the possession of lawful motives on the part of these defendants, and are in no way inconsistent with the innocence of these defendants of the offense charged in this case, and hence, are not competent evidence of the proof of the charges;

Sixth, that these documents add nothing to the record already made in this case showing the intervention of various defendants under Sub 84 proceedings, and hence constitute an unnecessary burdening of the record in this case.

Seven, that these documents, procured from the files of the AAR are being introduced for the purpose of indicating the contents of a privileged communication between Mr. Hays and his clients;

Eight, that the intent of a railroad to block the issuance of a certificate of authority to a competing motor carrier, by intervention and participation in administrative proceedings, is a proper motive for action on the part of a railroad.

2820 There are further matters I would like to submit out of the presence of the jury, and a decision on that point.

THE COURT: I don't think it is necessary.

MR. BALL: Number nine, for the reason that joining together in the maintenance of a common position before an administrative agency was an exercise of rights guaranteed to these defendants by the First Amendment;

Tenth, for the reason that all issues with respect to these Interstate Commerce Commission proceedings have been settled by the reported order of the Interstate Commerce Commission.

Now for the question of the Western railroad defendants themselves, apart for the moment from the AWR --

THE COURT: All of the defendants will be given the benefit of that objection.

MR. BALL (continuing): -- the Western defendants object on the ground that this letter was neither written by nor addressed to any of these defendants, and is not binding upon or evidence competent as to such defendants in this case.

2821 THE COURT: Now what is the reason that you claim you are offering this exhibit, Mr. Wright?

MR. AILES: Could I add one word, your Honor?

THE COURT: Yes, Mr. Ailes. Let's hear from the defense first.

MR. AILES: I just noticed Mr. Wright was offering this against the AWR.

This document is not addressed to AWR --

THE COURT: Southern Railroad, AAR, and American Association of Western Railways.

MR. AILES: This is not addressed and does not refer to the AAR, does not indicate on its face that a copy was sent to AAR. We have no connection with it other than that a copy was found in our files.

For reasons as stated earlier this morning, I submit this document is not admissible against AAR.

THE COURT: What is the purpose of offering the document, Mr. Wright?

MR. WRIGHT: The purpose of offering the document is to show that not only the railroads immediately involved, but these associations, were interested in this Riss hearing, and this is preliminary to showing the way in which a so-called Defense Committee was organized, which included not only all of the defendant railroads here but these associations that are referred to here as well.

2822 THE COURT: Now, ladies and gentlemen --

MR. GATES: Your Honor.

THE COURT: Mr. Gates, yes sir.

MR. GATES: Mr. Wright is guilty of a gross misstatment. The associations were not part of that Defense Committee.

THE COURT: Which associations?

MR. GATES: He just used the words "these associations".

THE COURT: Do you want to qualify that by deleting the words "associations"?

MR. WRIGHT: I say that it is true that ostensibly the American Association of Railroads and the Southern Presidents' Conference, those people did not intervene in the proceeding. They were not actually present.

But my point is that it was with their assistance and aid that the Defense Committee was organized; that they knew about it, and all of these activities of course are activities which tend to link all of these defendants together in their opposition of Riss & Company.

* * *

2840 THE COURT: Let Mr. Ball at this time state the grounds of the objection to Document Number 7, which purports to be Proccedings of Conference in Room 474, Union Station Building, Chicago, Illinois, September 27, 1951.

This will be Document number what?

MR. BALL: Plaintiff's Exhibit 42, your Honor.

* * *

2868 MR. BALL: If Mr. Wright will state against whom Plaintiff's Exhibit 43 and 43-A are to be admitted I will then state the objections to those documents.

I am just trying to keep this in sequence.

THE COURT: Very well.

MR. BALL: Mr. Shea would like to state his objections first to the documents.

THE COURT: Very well.

MR. WRIGHT: That document is a letter from the Southern Railway System to Mr. Joseph Hays of the AWR, dated October 4th, 1951, and it will be offered against the Southern Railway and the AWR.

THE COURT: All right, Mr. Shea, you may state your objections.

MR. SHEA: I want to state it very briefly, Your Honor, and I want to state the objection of relevancy. Mr. Wright has admitted and conceded that he is not contending that this participation in the proceeding before the Interstate Commerce Commission by the defendants, or any of them, is evidence of this alleged conspiracy. He has further conceded that there is no claim that there was a violation of the antitrust laws by any of the defendants, or participation with others, and he has conceded a good many things along this line.

2869 It is quite obvious, therefore, that he has conceded that this letter did not represent and does not represent any action which would show any participation in any conspiracy.

THE COURT: Let me see the letter you are talking about because we have it numbered on the back one way.

MR. SHEA: It is Plaintiff's Exhibit 43 for identification, and it is numbered 8 on the back. There is a letter and an attachment.

THE COURT: The letter on the stationery of the Southern Railway; right?

MR. SHEA: Yes, sir.

THE COURT: Let me read it.

All right. Now, what is the purpose of offering this, Mr. Wright, which was written on the bottom here?

You have stated your objection, Mr. Shea?

MR. SHEA: Well, that is basically it, Your Honor. I mean, if this proves anything, all it proves is that an employee of Southern sought to enlist a shipper witness in this proceeding.

Mr. Wright has conceded that that is an entirely legal thing to do, and it implies nothing with reference to the participation in a conspiracy.

Therefore, it is clearly irrelevant to any issues in this case. It clearly should not be put in evidence. As I said before, if this were being tried before you without a jury, I would not say anything about it.

2870 THE COURT: Well, maybe the same argument could have been made with respect to every one of these documents. Maybe standing by themselves, each paragraph, each document, each letter, may not prove a conspiracy, but I don't know what it is going to prove when all the evidence is in. I mean, people do not sit down around a table and say, now, gentlemen, we are going to conspire to combine and violate the antitrust laws.

We know that these cases are not proven in that manner. They are proven by a series of circumstances or circumstantial evidence.

2871 THE COURT (continuing). The point is that I can't make up my mind at this time whether it proves anything or it doesn't. I think it is material to the issue. I think it is a question for the jury to decide at the proper time.

Now, Mr. Ball.

* * *

OBJECTION TO PLAINTIFF'S DOCUMENT NO. 8 BY MR. BALL

2873 MR. BALL. Then AWR and the Western Railroads object to the introduction of this letter on the grounds of irrelevance and on the following specific grounds:

First, the letter does not tend in any way to prove that any defendant intended to create any testimony. The reference to that is to the statement of counsel that this was offered to prove that we created testimony--the inference being manufactured testimony--and the letter does not in any way tend to substantiate that claim made for it.

Second, the letter does not in any way prove any intention to submit the proposed witness without showing any connection with the defendants. And the fact is, as plaintiff well knows, that the testimony of the Georgia and Pacific Pine Wood and Lumber Company's representative was presented by railroads' counsel of behalf of the railroads. So that again the offer to get testimony of an unaffiliated witness, with the implications for which this

is being offered, is unsound on the face of it and on the basis of the rest of the record known to counsel.

2874 Third, the solicitation of public witnesses to appear in opposition to applications for authority is entirely proper. It is customary and is in no way inconsistent with a proper and lawful intent.

Fourth, collaboration between the parties to the Sub-84 and consolidated proceedings in the procurement of evidence and testimony is in no respect inconsistent with the existence of a lawful motive, and hence the document does not tend to prove or disprove any issue in this case.

Five, the joining together in the maintenance of a common position before an administrative agency in a matter of public concern was the exercise of rights guaranteed to these defendants by the First Amendment to the Constitution.

In addition the Western Railroads specifically further object on the grounds that these documents were neither written by nor addressed to such defendants, and they are not admissible against those defendants.

THE COURT: All right. Mr. Wheeler?

MR. WHEELER. Your Honor, I wanted to just address myself briefly to this same point that was adverted to or to the same language that was adverted to by Mr. Ball, and that is this reference to creating testimony.

2875 Now I am sure Your Honor well knows that in cases before administrative agencies and particularly before the Interstate Commerce Commission it is accepted practice and in fact in some cases there are orders issued by the Commission itself which direct the preparation of prepared statements, that is, statements that are spelled out in complete detail.

In some instances those statements, and not infrequently, those statements are distributed in advance of the hearing, under order of the Commission. In others, they are usually distributed at the time of the hearing, and the witness is then put on the stand to read them.

Now this is a matter that is of common practice. It is known to the Commission. It is known to everybody that has anything to do with Commission practice. And I therefore think, if this document is to be

admitted, that you ought to instruct the jury there is nothing immoral or wrong about a practice before the ICC, THIS practice before the ICC of putting in prepared statements in advance, preparing them in advance.

I think this letter shows that the witness himself was going to go through all of the documents surrounding it that had any bearing on it, so that he would be prepared for cross-examination. It was merely asking and suggesting to counsel that his prepared statement -- which is, as I say, a common practice before the ICC -- should be prepared by counsel. We do it every day in the week and think nothing of it; and I know Mr. Layne does it. As a matter of fact, in connection with Mr. Moody's testimony here he was so accustomed to it he prepared it and distributed it in advance.

2876 THE COURT. What do you say to that, Mr. Layne?

MR. LAYNE. In the first place it is true that for the benefit of counsel in this case, as I understood the Court desired to do in connection with expert testimony, I circulated, with Mr. Moody's help, the main points of what his testimony would be.

MR. WHEELER. I can't hear you.

MR. LAYNE. I will ask the reporter to read it.

THE COURT. All right. Will you read what Mr. Layne said, Mr. Reporter.

THE REPORTER (reading). "In the first place it is true that for the benefit of counsel in this case, as I understood the Court desired to do in connection with expert testimony, I" --

MR. LAYNE. I will restate it. I assisted Mr. Moody in the preparation of what his statement would be, in accordance with what I understood the desire of the Court to be, and in the hope to expedite the case.

2877 But if Mr. Wheeler is suggesting that I ever in my practice before the Interstate Commerce Commission participated in what is to be proved here, Mr. Wheeler is quite incorrect and he knows he is incorrect.

Now what we are talking about here is an entirely different matter. So far as the presentation of written answers or responses to

questions in court proceedings, it is not unusual in United States district courts to do it. But so far as this proceeding is concerned before the Interstate Commerce Commission, it is referred to by the Commission and the examiner who heard it as the most extraordinary motor carrier case ever heard by the Commission -- and I am trying to show to the jury why it was the most extraordinary case.

THE COURT. All right. Now let's don't try the case all over again. Let's move along.

MR. LAYNE. I agree.

MR. BALL. May I, in the light of counsel's statement, add another ground to our objection?

THE COURT. All right.

MR. BALL. That counsel has now put a further gloss on this document which it does not bear.

* * *

2880 MR. WRIGHT: The next is 7-1, which has been marked for identification as Plaintiff's Exhibit 44. It is a memorandum from Mr. Faricy, who was Chairman of the AAR -- was then -- to Mr. Feldman, an employee of its competitive transportation committee, dated October 3d, 1951, with a copy to Mr. Joseph H. Hays. And this will be offered against the AAR and the AWR.

THE COURT: Where was it obtained from?

MR. WRIGHT: This came from the files of the AAR.

THE COURT: And who is Mr. Faricy?

MR. WRIGHT: He was the chairman.

THE COURT: Of the AAR?

MR. WRIGHT: Or president. I beg your pardon.

THE COURT: All right.

MR. AILES: May I be heard briefly on that, Your Honor?

THE COURT: Yes.

2881 MR. AILES. I would like to object to the introduction of this document on the ground it is irrelevant. This document constitutes no official action of the AAR. It is nothing but a memorandum of information from Mr. Faricy to Mr. Feldman, another employee. It speaks of no action being taken or even contemplated.

Actually, if you read the document, all it says is that "a railroad president wrote me that a trucker said that the Navy will truck its own ammunition if the trucker is put off the road by the Sub-84 case."

And Mr. Faricy writes back and says, "We shouldn't be scared by that. My own view is that we should prosecute that case, or that the railroad intervenors in that case should carry through their opposition to it."

Now that particular statement, the relaying of that statement by Mr. Faricy to Mr. Feldman within the agency, is not any evidence whatsoever of any kind of an improper motive on the part of the AAR. In no way does it do what the plaintiff says it does.

2882 The fact that a copy was sent to Mr. Hays, of the AWR, as the plaintiff refers to here, merely shows that Mr. Faricy knew that Mr. Hays was a man in charge of organizing counsel in that case, and that he thought he would be interested in his views on this particular question, of whether the railroads should be scared off from appearing in opposition in that case, because of this alleged threat of government intervention.

It certainly doesn't prove, or even tend to show, as plaintiff says, that AAR's competitive transportation research organization was the operating arm of AAR which had jurisdiction of this matter. It is absolutely devoid of any probative effect of that character. And it certainly doesn't show the belief of AAR's president, Mr. Faricy, that there was an important relationship between the use of rail section 22 rates and concerted railroad opposition to Riss' Sub-84 application and complementary means of monopolizing government munitions traffic to the railroads.

Actually what it says is that "I think even if the railroads prevail in the Sub-84 proceeding, if some of the modifications that are under consideration

now with the government had taken place, that the government won't even think about putting in their own explosives trucking."

Now, Your Honor, at this time I would like to call your attention to the fact that here an association has been sued, and that the cases are clear that if you want to impose liability on an association, you have got to show association action. The mere fact that an employee or an officer of an association engages in improper activity is not enough. You have got to show-- and I cite you the case Your Honor cited in his opinion, the Food and Grocery Bureau of Southern California --

2883 THE COURT: Against Jenkins.

MR. AILES. Yes, sir. Now that case is important for two reasons, it seems to me. One is it makes it very clear that you don't impute an improper motive to the fact that an agent has gone over to the association principal.

Second, it makes it very clear that if you want to tie an association into some conspiracy or other, you have got to prove that the association took action -- the only way the association can, which is in meeting -- to do something.

You don't prove anything by proving that the president or any employee had any kind of a motive, if this letter discloses an improper one, which I submit it plainly does not.

Now I think it is also clear, Your Honor, over and above the fact that this is completely without any probative force here, that this document falls within no recognized exception to the hearsay rule. This is a statement by Mr. Faricy. It is not under oath and it is not subject to cross-examination. It is an internal memorandum and hence could not be an admission. It certainly is not a business entry. This is a casual communication, as Standard Oil of California says, as of the type that might well be made by telephone.

2884 Now there is no exception under the hearsay rule under which this can come. This document is completely irrelevant on the face of it.

It is very simple for Mr. Wright to assume the existence of this horrible conspiracy. Once that assumption is made, everything seems to fall into place. But he has got a problem of proving a conspiracy. And this is a

serious case with tremendous liability and tremendous consequences involved. I submit Your Honor should not permit material like this to go before the jury in the absence of some real showing that there is something to--

THE COURT. Well let me find out from counsel what probative value he thinks this document has -- or copy of a memorandum, or whatever it happens to be.

MR. BALL. Would you like to have our specific objection stated by me first?

THE COURT. All right. Suppose you do that, and then I will give him a chance.

* * *

2885 MR. BALL. I will state these without argument, if the Court please.

THE COURT. We just can't do it in this way.

MR. BALL. The Association of Western Railroads, and the Western Railroads, object to this document as hearsay and as irrelevant, and on the following specific grounds:

First, the fact that a copy of this document was sent to Mr. Hays, of AWR, does not constitute competent evidence either that AWR was acting with an improper motive in any respect, or that AWR was acting in concert with AAR in any matter whatsoever.

2886 Two, the document does not in any way refer to plaintiff, or evidence the existence of any activities directed against the plaintiff, other than as a member of the class of applicants for explosives authority. And hence the document neither refers to nor evidences the existence of anti-Riss activities or the interest of any party in any such anti-Riss activities.

Three, the document does not evidence the taking of any action or the intent to take any action by any defendant, other than to continue opposition to applications for explosives authority, and to negotiate with the Department of Defense for better procedure in handling section 22 rates, neither of which activity was in itself unlawful, and neither of which activity was inconsistent in any respect with the existence of a wholly lawful and proper motive on the part of those participating in such activities.

Four, the document does not, contrary to plaintiff's assertion, indicate that either successful opposition to the grant of explosives authority, or successful negotation of improved procedures on section 22 rates, would result in or was intended to result in a monopolization of government munitions traffic, or that there was any relationship between the two types of activities.

2887 The Western Railroads specifically object on the ground that this document was neither written by nor addressed to any of these defendants, and is not admissible as to any of these defendants.

* * *

2893 MR. BALL. I would like to state two very brief objections collectively to 45, 45-A and 45-B, which collectively are documents 8-2.

* * *

2893 MR. BALL. Well on behalf of the defendants whom I represent, we object on the grounds of irrelevance, incompetence, hearsay; and also, more specifically:

2894 One, for all of the reasons stated in our objections to Plaintiff's Exhibit 44.

Two, that these documents were not written by or transmitted to any of these defendants, and are incompetent to prove or disprove any issue as to these defendants.

Three, that the opinions or reasoning of Mr. White are not in any way binding upon or evidence against any defendant in this case.

* * *

2896 BY MR. BALL: These defendants object to Plaintiff's Exhibit 46, all of them, as incompetent and irrelevant, and for the following specific reasons:

One, for all of the reasons stated with respect to Plaintiff's Exhibits 44, 45, 45-A and 45-B.

Second, that such document does not evidence joint action of any kind between these defendants and the AAR or any other defendant or party.

The defendant Western Railroads further object that this document was neither written by nor addressed to any of these defendants, and is not admissible against them.

* * *

2896 MR. GATES. Your Honor, so far as 47 is concerned, may we hear first who it is being offered against?

2897 THE COURT. Yes. Against whom are you offering No. 47?

MR. WRIGHT. It is against the Atlantic Coast Line Railroad Company and against the Traffic Executives Association.

THE COURT. Very well.

MR. SHEA. Your Honor, I make the argument on relevance and hearsay that you have heard twice.

THE COURT. The same argument will apply -- and the same argument that you made, Mr. Gates.

MR. GATES. Well, I didn't make much of an argument before, Your Honor. But I certainly will restate the objections that were made.

THE COURT. You may.

MR. BALL. On 49 --

MR. WRIGHT. The next one is 48. Let's take them in order.

MR. BALL. Well I have some further objections to 47, if the Court please, which I can read very briefly.

THE COURT. All right. What document number is No. 47?

MR. BALL. No. 9.

THE COURT. No. 9.

MR. BALL. That again defendants object for all the reasons stated on behalf of these defendants in their objections to Plaintiff's Exhibits 43 and 43-A.

2898 Second, for the reason that such document does not refer to plaintiff except to the extent that plaintiff was a member of the class of applicants for explosives authority, and hence this document does not evidence any specific opposition to plaintiff on the part of any defendant.

Third, for the reason that such document does not in any way evidence an intent or effort to eliminate Riss' operations in ammunitions transportation, or the existence of any improper motive whatever direct specifically to the status of the plaintiff.

THE COURT. Very well.

MR. BALL. Fourth, for the reason that joining together in the maintenance of a common position in proceedings before the Commission in a matter of public interest was the exercise of rights guaranteed to these defendants by the First Amendment.

The Western Railroads, other than the Great Northern, object on the ground that this letter was neither written by nor addressed to any employee of those defendants.

THE COURT. All right. Does that complete the objections to all of the exhibits now?

MR. BALL. No. We have 48, 49 and 50.

THE COURT. Well let's finish. What is the document number of the next one?

2899 MR. BALL. Forty-eight is document No. 10.

Does the Court desire Mr. Wright to state against whom it is offered, first?

THE COURT. Yes.

MR. WRIGHT. That is offered against the AWR.

THE COURT. The AWR, all right.

MR. BALL. Now on this one the AWR renews the claim of privilege, both on the basis of a communication between attorney and client, but more specifically in this case on the basis or the principles of Hickman versus Taylor.

I can go ahead and dictate the objections, subject to the claim of privilege, if it will save the Court's time.

THE COURT. Very well.

MR. BALL. Subject to this claim of privilege, these defendants object to the document --

First, for all of the reasons stated by these defendants in objecting to the Plaintiff's Exhibit 42.

Second, for the reason that the document does not in any way evidence the creation of public opposition to explosives trucking.

Third, for the reason that the types of public organizations from

which testimony was to be solicited were organizations having a legitimate interest in the proceedings, and which were held by the ICC to have such an interest and to be entitled to be heard.

2900 Four, for the reason that nothing in this document refers to Riss, other than as a member of the class of explosives applicants.

Five, for the reason that solicitation of assistance from public organizations and other persons and organizations interested in a matter of public concern was an exercise of rights guaranteed to these defendants by the First Amendment.

Six, for the reason that the giving of assistance in the preparation of the testimony of a witness, for submission to the ICC, is not the creation of testimony, nor the performance of an unlaw act, nor in any way inconsistent with a proper motive.

Seven, for the reason that the choice by counsel of evidence for presentation in an administrative proceeding cannot constitute evidence of an improper motive.

Eight, for the reason that the record is devoid of evidence that accidents involving poison gas and dangerous chemicals was presented by these defendants in the hearings, or that it was not included within the scope of these proceedings.

Nine, for the reason that the document does not in any way evidence any intent or motive to suppress evidence relevant to the issues in the explosives case.

2901 Ten, for the reason that the maintenance of a common position before the ICC in a matter of public concern--well, I have already stated that.

* * *

2966 MR. WRIGHT: Yesterday, Your Honor, I had had marked and offered in evidence as Plaintiff's Exhibit 41, a document, a letter from Mr. Ernest Norris, Chairman of the Southeastern Presidents' Conference, to Mr. Loomis, Chairman of the AWR, which is dated August 30, 1951.

That letter, in the first sentence, refers to, "Responding to your letter of August 9," in typing, and then, in handwriting on the document is a statement, "should be August 29."

The next document that I identified and offered was the letter from Mr. Loomis to Mr. Norris and to Mr. Metzman, Chairman of the Eastern Railroads Presidents' Conference, which is undated in typing, but has written on it in pencil "August 29."

The next that I will ask to have marked as 41-B and 41-C, respectively, the enclosures with that letter from Mr. Loomis to Mr. Norris and Mr. Metzman, which consist of a letter from Mr. Loomis to Chief Executives of Member Roads, dated August 24, 1951, and I will ask to have marked as 41-B, and a memorandum from Mr. Joseph H. Hays, counsel to Mr. D. P. Loomis, Re: Applications of Certain Motor Carriers for additional operating authority to transport explosives, dated August 24, 1951 -- that I will ask to have marked as 41-C.

2967 THE DEPUTY CLERK: Plaintiff's Exhibits 41-B and C for identification.

(Plaintiff's Exhibits 41-B and 41-C were marked for identification: Letter dated August 29 from Mr. Loomis to Mr. Norris and Mr. Metzman, 41-B; 41-C, Memorandum from Mr. Joseph H. Hays dated August 24, 1951)

MR. WRIGHT: Then, I now want to offer with these documents, the thirty page document which was on our pretrial list as 6-2.

* * *

2971 THE COURT: Do you propose to read all this?

MR. WRIGHT: No. We do not. I just propose to offer it. This will be 41-D. I think I already described that as a letter from Mr. Loomis to Mr. Faricy, and the proceedings of the meeting would be 41-E. This, we didn't enter -- the proceedings of the meeting. The memorandum would be 41-E --

MR. BALL: No. You just made the other one E.

MR. WRIGHT: I'm sorry. I think I did. 41-F is the memorandum.

(Short discussion off the record.)

MR. WRIGHT: I was going to mark 41-G, this sheet -- "1" -- attached to the memorandum, Applications on Agenda of Pre-Hearing Conference; and Sheet 2 would be marked 41-H -- that is the Riss & Company -- that is Mr. Mayo's statement, rather, about his testimony. Then Sheet 3 is --

THE DEPUTY CLERK: Can't they be separated so that it will be easier to handle?

THE COURT: Can they be separated --

MR. WRIGHT: Well, I think they are an attachment -- all sent to the AAR together, and I think they should be --

2972 THE COURT: Let him finish.

MR. WRIGHT: Sheet 3 is 41-I, The Interstate Commerce Act, National Transportation Policy. Sheet 4 is 41-J, and that is a Statement Showing Tons Originated and Freight Revenue from Ammunition and Explosives.

Then we will mark as 41-K the letter from Mr. Hays to Mr. Blanning, the Interstate Commerce Commission, dated September 7, 1951.

A letter from Mr. Hays dated September 13, 1951 will be marked 41-L.

Then, the Brief Commodity and Territorial Descriptions in Applications in August 23 Order, will be marked 41-M.

Then, the Brief Commodity and Territorial Descriptions in Applications in September 11 Order will be marked with the last number here -- that would be 41-N.

MR. BALL: We re-assert the claim of privilege with respect to 41-E and its attachments, the subsequently numbered documents, both on the ground that this was a communication from counsel to client, and on the further ground that it is a matter of describing the deliberations of counsel and witnesses in the preparation of the case for trial, and is privileged under the rule of the Hickman case.

2973 THE COURT: Is that Hickman against Taylor.

MR. BALL: Hickman versus Taylor.

We would like to object to all of these documents for the reasons set forth, and the objection is already stated, to Plaintiff's Exhibits 40, 41-A, 42, 43, 43-A, and 48. I think that takes care of it.

* * *

2989 OBJECTIONS OF DEFENDANTS BALTIMORE & OHIO RAILROAD (11), ERIE RAILROAD (29) AND THE PENNSYLVANIA RAILROAD (66) TO PLAINTIFF'S EXHIBITS FOR IDENTIFICATION NOS. 50, 51, and 52

Plaintiff's Exhibit for Identification No. 50

1. This document is objected to on the ground that it is hearsay.

2. That it is not a business record within the meaning of 28 U.S.C.

2990 Par. 1732(a).

3. That it is not an admission by a person authorized to make an admission for any defendant.

4. That if it be considered an admission by some other defendant, such other defendant had no authority to make an admission on behalf of any of these defendants, and none of these defendants have adopted said admission.

5. That the document is irrelevant and immaterial to any issue in this action.

Plaintiff's Exhibit for Identification No. 51

Objection is made to this exhibit on the grounds stated with respect to Plaintiff's Exhibit for Identification No. 50, plus the following grounds:

1. The document shows on its face that it is a draft, and not the final version of whatever it may be.

2. Neither the authorship nor the intended recipient of the document is shown.

3. As an internal memorandum, the document is not binding even upon the organization by whose employee presumably prepared it, much less

upon any other defendant.

4. The document contains double hearsay and matters of opinion.

2991 Plaintiff's Exhibit for Identification No. 52

Defendants object to this exhibit on the grounds that the document is hearsay, incompetent, irrelevant and immaterial.

/s/ James H. McGlothlin
James H. McGlothlin
James C. McKay

701 Union Trust Building
Washington 5, D. C.

Attorneys for Defendants
(11), (29) and (66)

OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS TO THE ADMISSIBILITY OF PLAINTIFF'S EXHIBITS 49, 50, 51, 52, and 53

Defendants, The Association of Western Railways and the fifteen individual railroad defendants sometimes referred to as the Western railroad defendants, object to the admission in evidence of plaintiff's exhibits 49, 50, 51, 52, and 53, for the following reasons:

Plaintiff's Exhibit 49 (Document No. 1)

1. Said document is hearsay as to these defendants and is irrelevant to any issue relating to these defendants.

2. The Association of Western Railways and the Western railroad defendants were invited to share in the employment of Byoir and affirmatively refused to do so. No defendant can be made responsible under
2992 the theory of conspiracy for activities from which defendant has affirmatively dissociated himself.

3. It is admitted that Byoir was at no time employed by or on behalf of these defendants (plaintiff's answers to the interrogatories of these defendants, Interrogatory No. E-I-18(a) and (b)).

4. No documents relating to Byoir could constitute evidence of

the existence of a conspiracy between these defendants and the E. R. P. C. or its members.

5. The introduction of this or any other document relating to Byoir prior to the introduction of substantial evidence that the E. R. P. C. was acting in concert and by agreement with these defendants would be highly prejudicial to these defendants.

6. No cautionary instruction would mitigate the error in introducing documents relating to Byoir prior to introduction of substantial evidence establishing the conspiracy alleged.

7. There is no evidence whatsoever that these defendants ever had knowledge or notice of the terms of the employment contract between E. R. P. C. and Byoir or of the specific nature or intent of the activities of Byoir pursuant to the contract.

2993 8. The contract itself is no evidence whatsoever of any improper motive or purpose on the part of any defendant.

9. The contract shows on its face that it was entered into by Byoir and the Eastern Railroads - Transportation Committee, and hence is not competent evidence as to any defendant not shown to have been a member of that committee.

10. The contract is on its face for the performance of services of a kind protected by the guarantees of the First Amendment.

PLAINTIFF'S EXHIBIT 50 (Document No. 2)

1. For each of the grounds stated with reference to plaintiff's exhibit 49.

2. Said document is hearsay as to these defendants and is irrelevant to any issue relating to these defendants.

3. The document does not evidence any improper motive or purpose on the part of any defendant.

4. To permit the introduction at this time of documents evidencing at most a courteous action making available factual material relating to motor carrier competition would inevitably give to the jury the erroneous impression

that such exchanges of information may be considered by them as evidence of the existence of a conspiracy.

2994 In any event, these defendants request a cautionary instruction with respect to this document in particular that this document does not in itself evidence an illegal action or illegal purpose.

Plaintiff's Exhibits 51, 52, and 53
(Documents Nos. 4, 5, and 6)

1. For all the reasons stated in the objections to plaintiff's exhibits 49 and 50.

2. These documents are mere reports by Byoir employees to other Byoir employees and are not competent evidence as to these defendants.

3. These reports show on their face that they were not transmitted to any defendant other than Byoir.

4. These reports are replete with conclusions and opinions of the authors.

5. These reports are replete with statements that the author thereof has succeeded "in bringing matters about" or has "persuaded" persons to act, and such conclusions are not substantial or competent evidence as to these defendants.

6. These statements are replete with opinions and conclusions as to the purposes and intentions of third parties.

* * *

3009 THE COURT: That is going to be Plaintiff's Exhibit 54.

MR. WRIGHT: Yes.

(Whereupon Plaintiff's Exhibit No. 54, Association of Western Railways letter of October 16, 1951, together with attachment entitled, "Munitions And Motor Cars Won't Mix," was marked for identification.)

THE CLERK: What is it? State what it is.

MR. WRIGHT: That is a document of seven pages. It has a cover

page dated October 16, 1951.

MR. BALL: May I interpose for the record, Your Honor, an objection?

THE COURT: Yes, sir.

MR. BALL: The Association of Western Railways and the Western railroads object to this exhibit as wholly irrelevant and immaterial, and at most an exercise of the right of free speech which is guaranteed

THE COURT: And all the other matters contained in the original objections?

MR. BALL: And all the other objections.

* * *

3011 THE CLERK: Plaintiff's Exhibit No. 55 for identification.

(Whereupon Plaintiff's Exhibit No. 55, an article entitled, "It Can Happen In Your Town," was marked for identification.)

3012 MR. WRIGHT: I offer this against the C&O and the Southern Railroad.

MR GATES: If the Court please, the defendants object on the grounds it is irrelevent, incompetent and immaterial; and on the further grounds it is merely an expression of the right of free speech and all of the other grounds heretofore made.

THE COURT: Let me ask you: Why do you contend this exhibit is admissible? I have heard counsel on their objections.

MR. BALL: May we have this statement made in the absence of the Jury, because of the text of the article? I think it would involve testimony.

MR. WRIGHT: It doesn't involve any testimony at all.

THE COURT: Just be as brief as you can.

MR. WRIGHT: The purpose of the offer is to show that the Ties article was meant to be circulated not merely among the employes of the Southern Railroad, but among the other railroads who were also interested in this anti-explosive trucking campaign, one of which was the C&O.

MR. SHEA: This is clearly prejudicial. There is nothing in the record to show this. All it shows is Mr. Wright is trying to make a case out of little bits and pieces, and ragtag and bobtail. There is no proof in the record
3013 that the Southern Railroad was in the least responsible for this going into any particular place.

* * *

3029 THE COURT: All right now, Plaintiff's Exhibit No. 56 is next, I believe.

THE CLERK: Please identify it.

MR. WRIGHT: Exhibit 56, for identification, is a one-page article which appeared in the New York Central Magazine called, "Headlight," and it is being offered against the New York Central Railroad.

THE COURT: Any objection?

MR. WHEELER: Yes, sir.

THE COURT: All right, I will hear you. I will hear you at the bench this time. (Whereupon counsel approached the bench and the following proceedings were held:)

MR. WHEELER: Your Honor, the objections running to this are identical to the ones running to 55, plus this fact. This article bears little relationship to Exhibit 54. As Your Honor will see, starting with the first sentence, they don't use the same language at all. Furthermore --

3030 THE COURT: Maybe he is not offering it for that purpose. I didn't ask him for the reason.

MR. WHEELER: I am just assuming from his argument --

THE COURT: You are objecting?

MR. WHEELER: I am basing my objection in part on what he says about it in this argument, you know, that he submitted with it.. He says:

> "This document will be offered to show that New York Central acted to carry out the policy agreed upon at the Chicago meetings described in prior documents. This article was created pursuant to the suggestions of Document No. 11." Which is 54 now. He says:
>
> "Compare the text of the articles of Documents 11 and 13."

Now, not only is it not the same, sir, but it contains much additional information not even in the document No. 11, Plaintiff's Exhibit 54.

THE COURT: All right. I will hear Mr. Wright on it.

MR. WRIGHT: That document would be perfectly admissible in

3031 evidence against the New York Central if there were no similarities. The fact is, of course, that it is a contribution by the New York Central to the anti-explosives trucking campaign.

THE COURT: That is the thought that occurred to me.

MR. WRIGHT: There are actually many similarities that would lead anyone to infer that it had been taken from the AWR article.

THE COURT: That is the thought I had in mind before you read this. It seems to me it might be admissible under the fact that they took part

in this so-called anti-truck campaign. Whether or not they are a party to the alleged conspiracy combination, I don't know.

MR. WHEELER: We have never denied that New York Central published this. It was published in an internal magazine, in a magazine circulated only among its own people. It is an employes' magazine. But what Mr. Wright seeks to do is to impute this article to Exhibit 5.

THE COURT: Well --

MR. WHEELER: There is no connection shown.

THE COURT: He gave an additional reason which I was thinking about. It may be admissible to show what part they took in this alleged defamation campaign against the truckers. If they took part in it, and that is

3032 part of the conspiracy, an overt act, that is another reason.

I am going to admit it over your objection.

MR. GATES: Your Honor, may I on behalf of the defendants register the same objections, as being irrelevant, incompetent and immaterial, and merely an expression of the right of free speech, and merely an internal item.

THE COURT: That is all contained in the objection.

* * *

3033 MR. WRIGHT: I will ask to have marked with the next Plaintiff's Exhibit No. for identification a twenty-page document obtained from the files of the AWR. That will be marked at 57.

(Whereupon Plaintiff's Exhibit No. 57, twenty-page document from files of AWR, was marked for identification.)

THE COURT: Against whom are you offering this document?

MR. WRIGHT: That is being offered against the AWR.

THE COURT: We will wait until the Jury finishes looking at that exhibit. I will hear you.

MR. BALL: I simply wanted to register the same objection.

3034 THE COURT: Your objection will run to this for the same reasons.

* * *

3043 BY THE COURT:

* * *

But, at any rate, let me go back and explain to you a little bit what the plaintiff is attempting to show in connection with this alleged defemation campaign:

* * *

BY THE COURT:

But the plaintiff contends, if I understand their theory correctly, that, no, this wasn't done in the interest of brining before the I.C.C. the fact that trucks break up the roads or that they violate a lot of regulations and things like that; it was done pursuant to an unlawful objective and an unlawful conspiracy; and that one of the ways and the means by which they attempted to deprive or restrain trade, at least, in violation of the anti-trust law, was to carry on this so-called public relations campaign in
3044 which they allegedly put the plaintiff and the industry in a bad light.

Now, the defendants come back and say, "That's not so. We had a right, as every citizen has a right, to petition the legislature or go before the I. C. C. in a proceeding" -- and the rules provide for intervening in those proceedings, as you have been told -- "We had a right to intervene in those proceedings and show the Commission why they should not grant this authority to the trucking people who were applying for it; that they weren't fit to operate. It's true that articles were written about them, but they were true in fact and true in substance."

So you have an issue of fact there. That's the reason it becomes important for the jury to weigh all of this evidence and determine, after you have heard it all -- you haven't heard part of it yet, but after you have heard it all you must decide whether or not this public relations campaign which we will refer to as one of the over acts -- whether that was done pursuant to an unlawful objective, in violation of the anti-trust laws.

* * *

3061 MR. RIGHT: This is what you should mark.

(The document was marked Plaintiff's Exhibit No. 58 for identification, bearing the notation in pencil printing, Sent to editors of Railway Labor Magazine, List No. 41, with letter).

MR. WRIGHT: Yes, I want to offer it, Your Honor.

MR. PIERPOINT: May we have a statement against whom it is offered?

THE COURT: Against whom are you offering it?

MR. WRIGHT: This is being offered against the AWR.

THE COURT: All right.

Mr. Ball.

MR. BALL: The defendants object for the reasons that are stated in the specified objections which I am now filing and to be included in the record.

THE COURT: Very well.

(The objections referred to by Mr. Ball are as follows:)

3062 "1. For all of the reasons stated as objections to Plaintiff's Exhibits 54, 56 and 57.

"2. For the further reason that there is no showing that any of the editors of railway labor magazines or the railroad brotherhoods publishing said magazines was either an employee or agent of any defendant; and for the reason that plaintiff has admitted that no such persons or organizations were co-conspirators.

"3. For the reason that the said exhibit should not be offered in evidence except in connection with the deposition or depositions in which the circumstances of the preparation and circulation of the document was explained.")

MR. BALL: And we also object on the ground that this document should not be admitted unless the foundation is laid by the reading of the references in the Shoemaker deposition, which explained the nature of the document, and to permit the Court to have a proper appraisal and the jury to have a proper appraisal of what the significance of the document is.

* * *

3070 MR. McGLOTHLIN: That is Plaintiff's Exhibit No. 59 for identification. They are to be copied in the record, Your Honor.

THE COURT: All right. (The objections referred to by Mr. McGlothlin are as follows:

"1. That the document is hearsay:

"(a) It is not a business record of the defendant Byoir;

"(b) It is not an admission by the defendant Byoir;

"(c) As against these defendants, it is not a declaration in furtherance of any conspiracy.

"2. That, to the extent the document is offered to show the state of mind of Byoir, that state of mind is irrelevant, as against these defendants, to any issue in the case.")

* * *

3071 MR. BALL: The AWR objects to this for all the reasons previously stated to 54 -- no, to 49, 50, 51, 52 and 53, for the reason that this is purely hearsay against the AWR and no basis whatsoever --

THE COURT: It will be admitted over your objection. All right.

(The document previously marked for identification as Plaintiff's Exhibit 59 was received in evidence, a Byoir work report from Dick Strauss to Ren Birdler, dated March 6, 1952).

* * *

3079 MR. WRIGHT: These are interrogatories addressed to the Eastern Railroads Presidents' Conference.

"1. On what date was ERPC organized?"

The answer was: "Believed to have been in or about 1917.

3080 "2. Has ERPC ever had in writing any charter, by-laws, constitution, articles, plan of organization or statement of organization or purposes? The answer is: "Believed to have had none."

The next question is 3-B: "Who are members of ERPC?

The answer is: "The members are the Chief Executives of Member Lines. Attached, marked Exhibit A, is a list of the members of ERPC as of September 21, 1954."

Now, that list, and I will be glad to give Mr. Rhoads a copy--

MR. RHOADS: I think I know the interrogatory.

MR. WRIGHT: "Addresses, Member Roads, ERPC, H. B. Stewart, Jr., President, Akron, Canton & Youngstown Railroad Company, 12 East Exchange Street, Akron, Ohio; Arthur K. Atkinson, President, Ann Arbor Railroad Company, Railway Exchange Building, St. Louis, Missouri; H. E.

Simpson, President, Baltimore & Ohio Railroad Company, Baltimore & Ohio Building, Baltimore, Maryland; Curtis M. Hutchins, Chairman of the Board and President, Bangor and Aroostook Railroad Company, Bangor, Maine; Fred W. Okie, President, Bessemer and Lake Erie Railroad Company, Frick
3081 Building, Pittsburgh, Pennsylvania; T. G. Sughrue, President, Boston and Maine Railroad Company, Boston, Mass.; Donald Gordon, Chairman of the Board and President, Canadian National Railways, Montreal, Quebec, Canada; W. A. Mather, President, Canadian Pacific Railway Company, Windsor Station, Montreal, Quebec, Canada; Earl T. Moore, President, Central Railroad Company of New Jersey, 148 Liberty Street, New York; D. M. Kerr, General Manager, Central Vermont Railway, Inc., St. Albans, Vermont; Walter J. Tuohy, President, C & O Railway Company, Terminal Tower, Cleveland; Warren W. Brown, President, Chicago Indianapolis and Louisville Railway Company, Transportation Building, Chicago; William White, President, Delaware Hudson Railroad Corporation, Park Avenue, New York; Perry M. Shoemaker, President, Delaware, Lackawanna and Western Railroad Company, Cedar Street, New York; D. E. Smucker, President, Detroit, Toledo and Ironton Railroad Company, Schaefer Building, Dearborn, Michigan; P. W. Johnston, President, Erie Railroad Company, Midland Building Cleveland --"

MR. GATES: May I have that last one, Mr. Wright?

MR. WRIGHT: "P. W. Johnston."

MR. GATES: What company is that?

MR. WRIGHT: Erie Railroad.

MR. GATES: Thank you.

3082 MR. WRIGHT: "Stanley F. Mackay, President and General Manager, The Lehigh and Hudson River Railway Company, Warwick, New York; W. H. Edwards, President, Lehigh and New England Railroad Company, Anthracite Building, Bethlehem, Pennsylvania; C. A. Major, President, Lehigh Valley Railroad Company, Liberty Street, New York, New York; Walter S. Franklin, President, Long Island Railroad Company, Jamaica, Long Island; E. Spencer Miller, President, Maine Central Railroad Company, Portland, Maine."

Then there is a note on here that Mr. Atkinson and Mr. Okie is President of both companies.

MR. RHOADS: If your Honor please, I now ask the Court to instruct Mr. Wright to --

MR. WRIGHT: I haven't finished.

MR. RHOADS: I beg your pardon, sir.

MR. WRIGHT: "Alfred E. Perlman, President, New York Central System, Park Avenue, New York; L. L. White, Chairman of the Board and President, New York, Chicago & St. Louis Railway Company, Terminal Tower, Cleveland; Patrick D. McGinnis, President, New York, New Haven and Hartford Railroad Company, New Haven; L. D. Freeman, Trustee, New York, Ontario & Western Railway, Broadway, New York; Henry K. Norton, President, Susquehanna & Western Railroad Company, Cedar Street, New York; R. H. Smith, President, Norfolk and Western Railway Company, Roanoke, Virginia; James M. Symes, President, Pennsylvania Railroad Company, Suburban Station Building, Philadelphia; J. P. Newell, President, Pennsylvania-Reading Seashore Lines, Suburban Station Building, Philadelphia; R. N. Shields, President, Pittsburgh & West Virginia Railway Company, One Gateway Center, Pittsburgh; J. A. Fisher, President, Reading Company, Reading Terminal, Philadelphia; G. A. Caverly, President, Rutland Railway Corporation, Rutland, Vermont; J. Russel Couler, President, Toledo, Peoria and Western Railroad Company, Peoria, Illinois; Fred W. Okie, President, Union Railroad Company, Frick Building, Pittsburgh; F. D. Beale, President, The Virginian Railway Company, Norfolk, Virginia; Mr. Arthur K. Atkinson, President, Wabash Railroad Company, Railway Exchange Building, St. Louis; Mr. W. Arthur Grotz, President, Western Maryland Railway Company, Standard Oil Building, Baltimore 2, Maryland."

3083 This has those same notes that refer to Mr. Atkinson and Mr. Okie as President of both companies.

THE COURT: Mr. Rhoads?

3084 MR. RHOADS: If your Honor please, I would ask the Court to kindly instruct the jury that there are 35 members named by Mr. Wright in this last statement, and only five, I believe, are Defendants in this litigation.

3084 THE COURT: Do you agree to that statement?

MR. WRIGHT: That sounds correct to me. I am sure it is so.

THE COURT: Out of the 35 railroads named by Mr. Wright, five are defendants in this case.

MR. WRIGHT: The next question:

"H. Is there an executive committee of ERPC? If so, how, when, and by whom were themembers selected? For what term does each member of the executive committee serve? What is its function?"

The answer is, with respect to whether there is an executive committee is "Yes."

The answer to how, when, and by whom members are selected is: "The Executive Committee of the Conference was created by action of the membership of the luncheon meeting which was held in New York City on December 18, 1952. At that time, an Executive Committee consisting of six railroad presidents and the Chairman of the Conference in an ex officio capacity was designated. Thereafter, from time to time, as personnel of the Committee changed by virtue of retirements, etc., new members of the Committee were appointed to fill the vacancies thus created."

The answer as to what term does each member of the executive committee serve is: "There is no defined or stated term of office of the members of the Executive Committee. It has, however, been the practice to fill vacancies in the Executive Committee as they have, from time to time, occurred."

3085 "(4) In view of the fact that the Conference --"

The answer to what is its function:

"(4) In view of the fact that the Conference has neither any charter nor by-laws, the functions of the Executive Committee are nowhere spelled out in detail. However, it has been the practice of the Chairman to submit to the Executive Committee various matters of importance when they have arisen during the interim between meetings of the full Conference."

The next question --

MR. SHEA: While there is a break here, has Mr. Wright pointed out against whom these are being read?

MR. WRIGHT: These are being offered against the ERPC and the member eastern railroads who are Defendants here, which are the New York Central, the B & O, the -- the New York Central, the C & O, the Pennsylvania, B & O, and Erie.

THE COURT: And Erie? Did you say Erie?

MR. WRIGHT: Erie; yes.

THE COURT: That makes four?

MR. WRIGHT: Five.

3086 THE COURT: I have New York Central, B&O, Pennsylvania and Erie.

MR. WRIGHT: I may have left out C&O. New York Central, C&O, Pennsylvania, B&O, and Erie.

THE COURT: All right.

MR. WRIGHT: "Are there any officers of ERPC?" And, the answer to that is: "As of September 21, 1954, the officers of ERPC were as follows: David L. Mackie, Chairman, 143 Liberty Street, New York, Bedminster, New Jersey, Railroad Affiliation -- None; J. Carroll Bateman, Assistant Chairman, same address, Westfield, New Jersey, Railroad Affiliation -- none; E. H. Barlow, Secretary, 37 Scenic Drive, Denville, New Jersey, Railroad Affiliation -- None."

The next item is "J": What are the committees, subcommittees and other subdivisions of ERPC?"

The answer is: "As of September 21, 1954, the Conference had the following committees and subcommittees: Executive Committee; Advisory Committee on Advertising; Agricultural Relations Subcommittee of the Committee on Public Relations; Audit Committee; Committee of Counsel; Eastern Operating Committee; Standing Committee on Labor Relations; LCL Traffic Committee to consider routing and avoidance of circuitous movements; Committee on Public Relations; Public Relations Advisory Council."

* * *

PLAINTIFF'S INTERROGATORIES BY MR. WRIGHT

3087 The next question is: "Has ERPC, or anyone in its behalf, at any time since January 1, 1950, done research for, prepared, published, or distributed in the District of Columbia, or contributed to the cost of research for, or preparation, publication, or distribution in the District of Columbia, of films, articles, press releases, or other publications?"

And, the answer is -- as to films, is: "ERPC, through AWR, has made contributions to the cost of producing and distributing a film, entitled 'Highways and Byways, U. S. A.,' on the subject of the need for and means of financing farm-to-market roads. The film was not produced in the District of Columbia. The completed film was donated to Farm Roads Foundation which has offices at 744 Jackson Place, Washington, D. C. ERPC does not know whether or not the film has been distributed in the District of Columbia. Copies may be obtained from Farm Roads Foundation.

"During 1952, Carl Byoir & Associates, Inc. advanced to AWR three sums aggregating $2,250.00 representing one-half of the cost of preparing the script for the film above described. ERPC reimbursed Byoir for the sums so advanced.

"During 1953, and to and including September 21, 1954, ERPC paid to AWR $61,156.13 representing ERPC's contribution to the cost of producing and distributing the film. This figure also included ERPC's share of $5,000.00 advanced by AWR in January of 1953 to Farm Roads Foundation as a 'donation for interest of general expenses of the Foundation.'"

3088 The next question is: "On what date was Carl Byoir & Associates, Inc., first retained by ERPC?"

And, the answer was: "Transportation Committee -- August 15, 1949; --"

That refers to the contract in evidence here.

"General Public Relations Committee - December 1, 1951 --"

That refers to the GRPC account.

And, "Eastern Railroad Presidents Conference - January 1, 1954."

* * *

3109 The answer was: The committees and subcommittees of the Eastern Railroad Presidents Conference, which functioned for the conference at any time between January 1, 1950 and September 21, 1954, the following tabulations show the identity, the railroad affiliation, and the period of service of the members of the Committee and subcommittees of the Eastern Railroad Presidents Conference, which functioned for the conference

at any time between January 1, 1950, and September 21, 1954, was prepared from the records of the Eastern Railroad Presidents Conference by personnel employed by that conference. The tabulation is believed to be accurate. It has not been checked against the records of each individual, of each railroad or individual named in the tabulation.

The Policy Committee on Competitive Transportation, and then there was -- that has been read, Your Honor.

And then there was, 2. Public Relations: 1950.

J. G. Lyne, Railway Age;

T. J. Deegan, Jr., Vice-President, C&O Railway Company;

C. R. Dugan, Manager Public Relations, New York Central System;

T. J. Ross, Pennsylvania Railroad Company;

3110 G. C. Frank, Assistant to President, Erie Railroad Company;

H. L. Baldwin, Publicity Manager, New York, New Haven & Hartford Railroad Company;

J. M. Fitzgerald, Vice Chairman, Committee on Public Relations;

R. M. Van Sant, Director of Public Relations, Baltimore and Ohio Railroad Company.

In 1951: T. J. Deegan, Jr., Vice-President, C&O Railroad Company.

R. F. Blosser, Manager of Public Relations, New York Central System; Mr. Blosser succeeded C. R. Dugan, September 30, 1951.

T. J. Ross, Pennsylvania Railroad Company;

G. C. Frank, Assistant to President, Erie Railroad Company;

R. M. Edgar, Vice President, Boston and Maine Railroad Comapany. R. M. Edgar succeeded H. L. Baldwin, January 18, 1951.

J. G. Lyne, Railway Age;

J. M. Fitzgerald, Vice-Chairman, Committee on Public Relations;

R. M. Van Sant, Director of Public Relations, Baltimore and Ohio Railroad Company

In 1952: T. J. Deegan, Jr., Vice-President C&O Railway Company;

3111 R.F. Blosser, Manager of Public Relations, New York Central System;

R. C. Champlin, Vice-President, Pennsylvania Railroad Company. R. C. Champlin succeeded T. J. Ross, April 17, 1952.

G. D. Frank, Assistant to President, Erie Railroad Company;

R. M. Edgar, Vice-President, Boston & Maine Railroad Company;

J. G. Lyne, Railway Age;

J. M. Fitzgerald, Vice-Chairman, Committee on Public Relations;

R. M. Van Sant, Director of Public Relations, Baltimore & Ohio Railroad Company;

1953: T. J. Deegan, Jr., Vice - President, C&O Railroad Company;

R. F. Blosser, Manager, Public Relations, New York Central System;

R. C. Champlin, Vice-President, Pennsylvania Railroad Company;

G. C. Frank, Assistant to President, Erie Railroad Company;

R. M. Edgar, Vice-President, Boston & Maine Railroad Company;

3112 J. G. Lyne, Railway Age.

And then for (4) there was a vacancy. Mr. Fitzgerald's position was vacant.

R. M. Van Sant, Director of Public Relations, B&O Railroad Company.

And then 1954, Committee superseded on reorganization of Conference in 1953.

Also listed is the General Public Relations Committee, Subcommittee:

For the year 1950, none.

For the year 1951, R. C. Champlin, Vice President, Pennsylvania Railroad Company;

R. M. Van Sant, Director of Publications, B&O Railroad Company;

T. J. Deegan, Jr., Vice President, C&O Railroad Company;

G. C. Frank, Assistant to President, Erie Railroad Company;

R. F. Blosser, Manager, Public Relations, New York Central System;

J. G. Lyne, Editor, Railway Age.

1952: R. C. Champlin; R. M. Van Sant; T. J. Deegan, Jr., G. D. Vrank; R. F. Blosser; J. G. Lyne, Editor, Railway Age;

R. M. Edgar, Vice President-Assistant to President, Boston & Maine Railroad Company;

3113 1953: R. C. Champlin, Vice President, Pennsylvania Railroad;

R. M. Van Sant, Director of Public Relations, B & O Railroad Company;

T. J. Deegan, Jr., Vice President, C & O Railway Company;

G. C. Frank, Assistant to President, Erie Railroad Company;

R. F. Blosser, Manager of Public Relations, New York Central System;

J. G. Lyne, Editor, Railway Age;

R. M. Edgar, Vice President, Assistant to President, Boston and Maine Railroad Company.

Committee superseded on reorganization of Conference in 1953.

* * *

3118 MR. WRIGHT: With that explanation, I will offer 60 and 61 in evidence.

THE COURT: Any objection by counsel?

MR. PIERPOINT: In view of Your Honor's ruling on Exhibit 59, I have no objection.

THE COURT: Very well.

(The document previously marked for identification as Plaintiff's Exhibit 60 was received in evidence, Background memo, ICC hearings on truck haulage of explosives.)

(The document previously marked for identification as Plaintiff's Exhibit 61 was received in evidence, List of trucking concerns with numbers of trucks and semi-trailers owned by each.)

MR. GATES: We object, on behalf of all defendants on the ground that it is irrelevant, immaterial and incompetent, and on the further ground that it is merely an expression of the right of free speech.

THE COURT: Very well; the same ruling.

* * *

3126 (Defendants' statement of objection to Plaintiff's Exhibits 62 through 62-O is as follows:)

3127 "These defendants object to this exhibit as being wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and on the following additional grounds:

"1. For all of the reasons stated in objections to exhibits 54, 56 and 57.

"2. For the reason that there is no showing that either the Texas Railroad Association or Gilbert Smith was an agent or employee of any of these defendants, or was a co-conspirator.

"3. For the reason that the mere furnishing to the third persons of reproductions of articles published in independent publications in no way constituted an activity inconsistent with non-membership by these defendants in the alleged conspiracy and the non-existence of an improper motive on their part.

"4. For the reason that all of the articles reproduced were articles published by independent corporations of organizations, and are in no way legally ascribable to any defendant in this case."

* * *

3140 THE CLERK: Plaintiff's Exhibits 63 and 63-A.

(Whereupon Plaintiff's Exhibit 63, copy of letter dated November 12, 1951 from A. L. Shultz to Joseph H. Hays, and Plaintiff's Exhibit 63-A, attachment, Special political letter from A. L. Shultz, were marked for identification.)

MR. WRIGHT: I offer them.

3141 (Whereupon Mr. Ball, on behalf of Defendants AWR and Western Railroad made the following objections:)

"These defendants object on the ground that said document is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case; and for the following specific additional reasons:

"1. For all of the reasons stated in the objections previously made to Plaintiff's Exhibits 54, 56, and 57.

"2. The exhibit consists of a letter written by A. L. Shultz and a copy of an article written by the Said A. L. Shultz and published on his own initiative; and the said A. L. Shultz, by Plaintiff's own admission, is not an employee or agent of any defendant nor a co-conspirator.

"3. The said article is neither binding upon nor evidence of any action taken by any of these defendants.

The individual railroad defendants object to the exhibit on the further ground that as to them it is hearsay."

THE COURT: They may be admitted.

MR. BALL: Over the objections, I take it.

3142 THE COURT: Over the objections.

* * *

3149 THE CLERK: Plaintiff's Exhibit 64 for identification.

(Thereupon, memorandum of Traffic Executive Association, Eastern Railroads Motor Carrier Bureau, dated 1-22-52, to Freight Representatives and Attorneys handling motor carrier matters for Eastern Railroads was marked Plaintiff's Exhibit No. 64 for identification.)

MR. WRIGHT: I offer it against Traffic Executive Association, Eastern Railroads.

* * *

3150 MR. GATES: May I have the same objection, Your Honor?

THE COURT: Yes, same objection.

* * *

DEPOSITION OF C. COLBURN HARDY READ BY MR. WRIGHT

* * *

3191 "Q. August 1953?

"A. to July 1954.

"Q. And I take it during that period your sole activity was not -- That is, you were not confined only to the United States Line account? You did other work for the organization too?

"A. As we all do.

"Q. And what was the nature of other work you performed during that period?

3192 "A. It covers a lot of things. Why don't you get more specific?

"Q. I can't tell you what you do. You'll have to tell me.

"A. Well, I did some work for several other of our clients on some planning activity. I did some legislative work for the Eastern railroads on a pretty much personal basis. I did some personal work for Mr. Byoir. I guess that would about cover it."

MR. WRIGHT: Now, I am now turning from there to line 10 at page 17. That is skipping from line 14 on 15 to line 10 on page 17.

(Reading.)

"Q. Then you also referred to some work you said you did for the Eastern railroads.

"A. Yes, sir.

"Q. Just tell us what that was.

"A. You had better get me my time, Bill. This was 1954. Right? In the State Legislature: Right? In 1954 the New Jersey Legislature had before it a bill for weight distance tax on heavy trucks, and because I have been active in politics I was asked to help out and talk -- give some information and material to some of the people whom I knew in the State Legislature. I did that in the late spring, maybe early summer of 1954.

3193 "Q. Now, you were asked to help out in what way?

"A. Well, I knew these people intimately. They trusted me. They respected me. They respected my judgment. So that when I came and gave them the facts, they were very appreciative of it, and many of the people called me up and asked me to come and give them the information.

"Q. Tell me just who were these people that you talked to.

"A. I wouldn't want to be quoted on exactly all of them because I don't even remember all of them. I mean many of these are personal friends, and you sit down and see them and you get talking on the subject. But among them were Mark Anton, who is Senator from Essex County. All of the Essex County Assembly delegation.

"Q. How many of those were there?

"A. There are twelve. The country chairman. And the various people who work with him. Senator Mills from Morris County, Assemblyman Franklin. The other assemblyman whose name I do not remember.

"I don't know. Scores of others. I know so many you can't -- I suppose I could go back and pick it up, but I don't think it's necessary and important.

3194 "Q. All these people you say were personal friends of your?

"A. Most of them, yes, sir.

"Q. You have yourself been a New Jersey legislator?

"A. Yes, sir.

"Q. When was that?

"A. 1942 and 1943. I am still active in politics.

"Q. And you say this was a special assignment taken on behalf of what client?

"A. Well, the Eastern railroads.

"Q. Well, specifically, the Eastern Railroads Presidents Conference?

"A. That's right. I guess it was for the Associated Railroads, wasn't it? Yes. Associated Railroads of New Jersey."

Now, I am omitting lines 9 through 15 and picking up the answer at 16.

(Mr. Layne continuing to read)

"I don't know what the jurisdictional breakdown is, but it was obviously the people I knew best and worked with closest with the Associated Railroads of New Jersey and the overall aegis was the Eastern Railroads Presidents Conference.

3195 "Q. I wanted to know who you got the assignment from originally and who talked to you about it.

"A. Mr. Swinehart, who was president of Carl Byoir.

"Q. He was the one who first talked to you about it?

"A. That's right.

"Q. What did he tell you you were supposed to do?

"A. He just said the railroads need some help, go and give it to them.

"Q. Well, he didn't indicate to you the nature of the help?

"A. No, sir, just -- I am a well-informed citizen of New Jersey. I am well aware of what the people are trying to do.

"Q. You didn't have to be told what the help was they wanted? Is that right?

"A. No, sir.

"Q. Well, what was the help they needed?

"A. They needed information made available to these various legislators and other people, prominent people in New Jersey.

"Q. Well, why was it that they needed you to make that information available? Was this some --

3196 "A. Might not need me, but I have a close personal association with many of them.

"Q. What was this information you were to make available?

"A. I couldn't -- It's this deep. It's this high. It's all the factual information about the weight distance tax and its effect on New Jersey, what it would mean in income, and so forth.

"Q. Now, that factual information you say is contained -- That is in printed form?

"A. Mimeographed.

"Q. This pile of documents you are referring to?

"A. Mimeographed, printed form.

"Q. And you have that data readily available here?

"A. No, sir, but --

"Q. Can we see it?

"A. Surely. I'm sure it could be made available. I don't have it.

"Q. You have it in permanent form?

"A. No, sir, I do not have it.

"Q. I mean the Byoir organization.

"A. I'm sure they are. It was fully and completely circulated in New Jersey.

3197 "Q. Well, was there anything you circulated among the legislators then that wasn't circulated otherwise? A. Of course not.

"Q. That is, there was nothing in this pile of data that you transmitted to them that hadn't been made available generally through other channels?

"A. Now, let me ask my counsel this: Why has this any bearing whatsoever? I'm a busy man. You people are busy. You're getting paid for this; I'm not.

Wait a minute. This has nothing to do with Riss and Company.

MR. WRIGHT: There is a statement there that was made by Mr. Murphy, his counsel. I don't know whether Mr. Pierpoint --

THE COURT: You want that in, Mr. Pierpoint?

MR. PIERPOINT: Your Honor, I object to this colloquy in the first place.

THE COURT: To get the sequence of it, continuity, suppose you read it.

MR. WRIGHT: Did Your Honor want me to read, then, whatever Mr. Hardy's counsel said?

THE COURT: Yes; I think in order to get what happened.

3198 MR. WRIGHT: Well then, you better start that answer again at line 22 on page 21.

MR. LAYNE: (reading)

"A. Now, let me ask my counsel this: Why has this any bearing whatsoever? I'm a busy man. You people are busy. You're getting paid

for this; I'm not.

MR. MURPHY: Coley, --

THE WITNESS: Wait a minute. This has nothing to do with Riss and Company. If you insist I'll --

MR. MURPHY: Go ahead.

THE WITNESS: I think I have a reasonable amount of intelligence, and there's nothing --

MR. MURPHY: Make this off the record.

MR. WRIGHT: No, on the record.

THE WITNESS: --nothing that has to do with the case.

MR. MURPHY: Answer the question.

THE WITNESS: What was that? What was your question?

(The reporter read the pending question.)

MR. WRIGHT: Mr. Wright said: "He said go ahead and answer it. Read it to him."

And the reporter read the pending question.

THE WITNESS: I think that is true.

"Q. Now, what were these other channels that it had been circulated through? How was the material generally made available to the public?

3199 "A. I do not know. There were other people in our organization who were working in New Jersey, the same as I was. And I presume they did it as I did -- call up somebody, sat down and talked with them or mailed it to them.

"Q. I am not interested at the moment in what the others did. I want to identify, if I can, this particular material you are talking about, what if anything you did with it. Now, can you give me a more accurate description of this material that you circulated other than what you have told me. Can you tell me what they are piece by piece?

"A. No, sir. For the most part, this contained information which said this is the law, the bill which is in the legislature; a copy of the bill; this is what this bill means to the State of New Jersey. Then it would have

a series of statistical facts showing the income which this tax would give to the State of New Jersey; it shows where the income would come from by type of, weight of trucks and out-of-state trucks and so forth. It would give a complete breakdown of the tax laws and information in other states. It would give a great deal of factual information about what authorities had said about this problem in other states and in New Jersey. It had charts. We had draw-
3200 ings. It was a graphic description of the facts on this weight-distance tax.

MR. RHOADS: If Your Honor pleases, I want to object to the last paragraph, starting at line 21, page 23, going through to the end of the answer, page 24, line 8, on the ground that it is protected by the First Amendment of the Constitution of the United States.

THE COURT: Very well.

MR. BALL: And may that objection stand without being repeated?

THE COURT: The objection will stand to all of this. Any part of it.

MR. RHOADS: Thank you, sir.

(The reading was continued:)

"Q. Now, this bill you say was a bill for weight-distance tax. Can you identify it otherwise. Do you know what the number of it was?

"A. No, sir.

"Q. Do you know who the sponsor of the bill was?

"A. Bill Haines of Burlington County.

"Q. This was a bill for weight-distance tax introduced sometime in '53 you say?

3201 "A. '54, I think. Wait a minute. No -- I think '54.

"Q. Well, I understand it was being considered in the spring of '54. "A. That's right.

"Q. The spring and summer? A. That is right.

Probably introduced about that time. And you don't remember --

MR. WRIGHT: Line 23, I think it is my question. Clearly indicated on all this.

MR. RHOADS: May I interrupt Mr. Wright?

If Your Honor please, do I understand Your Honor to rule specifically on the objection I made which was supplemented by what Mr. Ball said?

THE COURT: Yes. I overruled the objection.

MR. WRIGHT: Go back and read the answer on line 22.

(The reading of the deposition continued.)

"A. That is right.

"Q. Probably introduced about that time. And you don't remember the designation of it. A. No, sir.

"Q. No, then, you say this material you circulated consists of, one, a copy of the bill itself, and then some explanatory material as to what its ef-

3202 fect would be on the tax revenues?

"A. That's right.

"Q. And that was prepared by whom?

"A. I think I did most of it myself, from research which had been prepared. Some of it I prepared, digesting from material which was made available to me by the client, and other of it was printed material which would be photostats or reprints of material.

"Q. Well, in addition to the bill, there would be a document you prepared which summarized material which had been given you by the Eastern railroads? A. That's right.

"Q. And that document related to the revenue the bill would produce, is that right? A. That's right.

"Q. The expected revenue. A. That is right.

"Q. Now, is that all the document had on it? A. Oh, no.

"Q. What else did it have?

"A. I can't remember all these details. You are talking about a

3203 highly complex problem of taxation. You are talking in terms which were affecting a segment of your American propulation. I don't remember the details.

"Q. Anyway, do you have a copy of this summary in the files?

"A. No, sir, I doubt it. I was doing this, and whenever I went with somebody, I left my copy with him, because I knew enough to talk about it myself.

"Q. Well, do you have any practice in the organization with respect to material of this kind, as to whether or not you do keep copies of what you circulate, what you prepare and circulate?

"A. I am sure it is available.

"Q. Your ordinary practice would be to retain a copy of anything you prepare and circulate in the file, wouldn't it?

"A. No, sir, I never kept files.

"Q. I am not talking about you as an individual. I am talking about the Byoir organization.

"A. That is what I am trying to get my counsel to understand here. Take this off--

"Q. We want to know as much about this as your counsel.

3204 "A. Well, I am sure if you want to go to our offices, you can get all the information I have except what I might have typed personally myself for my own edification.

MR. MURPHY: --

MR. PIERPOINT: Your Honor, I will object again to this colloquy. It is strictly irrelevant.

THE COURT: All right. This colloquy -- can you proceed then?

MR. WRIGHT: Proceeding then to line 3 on page 27.

(Reading) Mr. Wright: "What I want to find out -- I am not interested in finding out so much of the practices as I am of the availability of the material. If it is there, we can save a lot of time simply by producing the document. If it is not there, I suppose the best evidence is whatever he can tell us about it.

"THE WITNESS: I am sure the documents are available. Many of them were printed.

"Q. You believe the summary that you prepared, together with the

data from which you prepared it, should be available in the Byoir files, is that right?

"A. I think you will find it so.

"Q. What were these other documents beside the bill and this summary you prepared that you gave to the legislators?

"A. Do you want to read back what I said? I will tell you again

3205 if I need to, but it seems to get pretty foolish. You are asking me to recall something which has happened almost two years ago, which was done on my own personal time, after hours and on week-ends. As I recall it, there was a copy of the bill. There was a statement summary of the bill. There were various charts and figures showing the effect of the legislation on various sized trucks. It showed the breakdown of incomes --

3206 "Q. These charts referred to in your statement -- were they exhibits attached to your statement or independent material?

"A. They were reprints of other articles, New Jersey Tax Policy Commission, scores of other factual information.

"Q. Now, there was nothing else, though, that you yourself had prepared other than the summary, is that right? What I want to find out first is whether there are any documents you prepared other than the summary statement to which were attached all of these other statements, charts and tables and what not.

"A. Not that I know of.

"Q. Whatever else you told them was just in the course of conversation. A. That is right.

"Q. And that was the only written material you used.

"A. That's right.

"Q. And this data, I take it, that you presented to them, was data in support of the bill, is that correct?

"A. Of course. But it also pointed out both sides of the argument. The people in New Jersey, the legislators, are rather an intelligent group of people. And you don't have to do anything but present the facts to them.

3207 "Q. Well, let me see if I understand this correctly. This presentation of yours, then, was designed to present all of the facts which would be unfavorable to the bill as well as those which would be favorable, is that true?

"A. In most cases it was to answer the questions which might occur in the mind of the legislator.

"Q. Well, I just want to know how this was assembled and what it was for. Do I understand you correctly in saying that this presented the truckers' side of the argument on the bill, too? A. Yes, sir.

"Q. As you saw it.

"A. No, quoting from their own statements.

"Q. But you didn't have the assistance of any trucking representatives in preparing this material, did you? A. No, sir.

"Q. What you did was take all the material that you found available and then you made a selection of what you thought was necessary to a fair presentation of the controversy, is that it?

3208 "A. You said it.

"Q. You had no interest yourself in whether or not these people you talked to voted for or against the bill.

"A. Of course, I did. What else was I hired for?

"Q. Well, that is what I am getting at. I presume the purpose of the presentation was to procure votes in favor of the bill. Is there any doubt about that?

"A. That's right -- absolutely.

"Q. And how long did this campaign go on that you have referred to?

"A. Well, I would think about a month, maybe six weeks -- somewhere in that period.

"Q. You cannot identify the period any better than the spring or summer of '54? Do you remember what months are involved there?

"A. I would want to check on it. But I recollect it was pretty hot. My hunch is it was about the middle of May to the middle of June.

"Q. May through June.

"A. Yes, It might have been a little earlier.

"Q. And what finally happened to the legislation?

3209 "A. The legislature continued in session. It did not act on the bill.

"Q. There was no final action one way or the other.

"A. There was no final action.

"Q. And have you done anything about the bill since?

"A. The legislature adjourned December 31, 1954.

"Q. Until when?

"A. The 1955 legislature started.

"Q. Are they in session now?

"A. Yes, sir.

"Q. But they haven't brought this bill up for consideration, is that right?

"A. I do not know.

"Q. At least you have done nothing in connection with the bill at the present session? A. No, sir.

"Q. Was there any particular reason for your activity in connection with the bill ending with that session and not continuing into this session?

"A. I do what I am told. I work for a living, and when the client asks --

3210 "Q. You haven't been asked for any service in connection with the present situation.

"A. That is right.

"Q. Now, has there been any other work you have done since this period in 1953 when you became principally assigned, as I understand it, to the United States Line account, in connection with the trucking industry?

"A. No, sir. I was finishing up the campaign in Pennsylvania in the late summer of '53.

* * *

3237 "Q. The first thing I want to exhaust is whatever recollection you

have got about the railroad people who gave you information about this problem. Now, one of them you recall is Littlefield of the Pennsylvania. Can you tell me the names of any others?

"A. The committee with whom we worked, Mr. Degan, Mr. Blosser, Mr. Frank.

"Q. First, identify, if you will, for me, the committee with whom you worked, as what committee?

"A. This was the Committee of the Eastern Railroads' Presidents' Conference which was under the top Chairmanship of Walter Touhey, President of the C. & O.. There was a sub-committee to which we reported directly.

"Q. They have a large number of Committees. I'm just trying to identify this first committee that Touhey was Chairman of. Was that the Public Relations Committee or Competitive Transportation Committee?

"A. I don't know.

"Q. But it was the committee that Touhey was Chairman of. Then

3238 you say there was a sub-committee of which Degan was Chairman?

"A. They were the working professional public relations people of the railroad, with Degan as Chairman.

"Q. Who else was on that committee; do you recall?

"A. They changed over the years, but among the people who were on, were Blosser of the Union Central, Mr. Frank of the Erie, Mr. Edgar of the B. & M., Littlefield, I think was associated with the Committee, I don't think he was on it, I'm not sure. There were others, but I don't recall who.

"Q. Well, I suppose, though, one of the first things you did was to discuss this program with that committee, was it not.

"A. Yes, sir. Well, Girdler would do the discussing and then tell us.

* * *

3256 "Q. You were unable then, as I understand you, to prepare any releases or issue any data which related only to the activities of long-distance

truckers?

A. No, sir, I wouldn't say that at all.

Q. Oh, you were able to make the separation? Is that right?

A. You lost me on that one. Let me come back and get what you're trying to say.

3257 Q. I say are you telling me now that you found yourself unable to separate the activities of the long-distance truckers from other trucking activities when you collected this data and publicized information?

A. Oh, no. Oh, no.

Q. You didn't have any problem there, did you?

A. We had problems, but it wasn't --

Q. Well, you managed to solve it? A. That's right.

Q. And you did issue a great deal of material which dealt solely with long-distance truckers? Correct?

A. I don't think that is -- No, sir. I don't think that's true.

Q. Well, a substantial amount of it?

A. Yes, sir.

Q. And just tell me if you can now what the general nature of the work you did with specific reference to these long-distance truckers was?

A. Well, in 19 --

MR. RHOADS: If Your Honor please, I suggest from now on this next answer you have a situation dealing with the unquestioned constitutional right of the defendant in this case, for whom this witness is speaking, to go to the legislature under the First Amendment to express the views which he,

3258 himself, may express as facts and to see to it that those things which he considers facts are put to the proper legislative halls and in the proper framework. And I think that everything that is going on here, sir, is clearly within the protection of the First Amendment to the Constitution of the United States.

THE COURT: I think I have already indicated to counsel on both sides that that is a fact, that under the First Amendment people have a

right to petition the Congress or Legislature. However, if that is done with an illegal purpose or an illegal objective in mind, that is a question of fact for the jury.

If the purpose was to violate the anti-trust laws, then, of course, they are not protected.

That has been consistently the Court's ruling.

MR. RHOADS: If Your Honor please, of course Your Honor understands that those on this side of the table definitely disagree with the conclusion which Your Honor has reached with reference to the application of the First Amendment to this case.

THE COURT: Very well. I think I stated my position early in the trial.

All right.

3259 MR. WRIGHT: May I repeat the question?

THE COURT: You may.

MR. WRIGHT (Reading):

"Q. And just tell me if you can now what the general nature of the work you did with specific reference to these long-distance truckers was?

"A. Well, in 1951 the Pennsylvania Legislature had a bill which was to increase the gross weight of heavy trucks. We were asked by our client to assist the Associated Railroads of Pennsylvania in defeat of this bill.

"Q. This was a bill to do what now?

"A. To increase the gross weight of trucks.

"Q. The allowable weight of the trucks?

"A. That's right -- legal weight limits. We worked with Mr. Reiter, Chairman of the Associated Railroads of Pennsylvania, in (1) gathering information on this bill, (2) on its effect on the State of Pennsylvania, (3) on making this information available to other people who were interested in this problem.

"The bill passed the Legislature but was later vetoed by the Governor. But what we did was to make this subject of highway problems interesting to

3260 the average citizen. And the press felt it was of sufficient import that they gave it considerable publicity. They ran a lot of stories, some of which we helped with material on, scores of others with which we had nothing to do. But we made the subject of highway transportation interesting to the average person -- Mr. Citizen, whose tax dollars paid for the highways.

"Q. Now, I understand, of course, one of your aims was to make any kind of a release you prepared interesting. Otherwise, it doesn't get published, does it?

"A. That's right.

"Q. But beyond that, I suppose your job consisted of a little more than just making the material interesting, didn't it?

"A. Well, of course.

"Q. So far as you were concerned, whatever material there was had a specific purpose, did it not?

"A. We were hired to help defeat this bill in Pennsylvania.

"Q. Yes. So that whatever you released was interesting material calculated to produce that effect?

"A. That's right.

* * *

3314 MR. WRIGHT: At this point, Your Honor, I would interrupt the deposition and offer in evidence the three Stull work reports which were previously marked for identification as Plaintiff's Exhibits 51, 52, and 53.

BY THE COURT: * * *

3317 Mr. Wheeler, you object to them?

MR. WHEELER: I object to them on the grounds they haven't been properly authenticated. You may recall, Your Honor, that in the original list which we stipulated with respect to authentication these documents were included on List 1 as documents as to which we would not request a witness. Subsequently, after making an investigation and conducting some interviews in Ohio with respect to these matters, and after uncovering the interview, the recorded interview which O'Connor had with Stull, which the plaintiff

recorded unknown to Stull, I wrote a letter to Mr. Layne, under date of January 4th, 1960, in which I told him that in the light of this further information I now desired to request a witness with respect to these documents.

THE COURT: Well I will overrule the objection.

* * *

3318 OBJECTIONS OF DEFENDANTS (11), (29), AND (66) TO PLAINTIFF'S EXHIBIT NO. 53 FOR IDENTIFICATION

These defendants and each of them object to the admission into evidence of the foregoing exhibit on the ground that the same is irrelevant, immaterial, and incompetent; and more particularly, without waiving any ground for objection not specifically stated, on the following grounds:

3319 "1. That, as against these defendants, there is no showing as to the source, authorship, purpose, use or transmission thereof.

"2. That the document is hearsay:

"(a) It is not a business record of defendant Byoir;

"(b) It is not an admission by the defendant Byoir;

"(c) As against these defendants, it is not a declaration in furtherance of any conspiracy.

"3. That, to the extent the document is offered to show the state of mind of Byoir, that state of mind is irrelevant, as against these defendants, to any issue in the case.

* * *

3332 OBJECTIONS OF DEFENDANTS (11), (29), AND (66) TO PLAINTIFF'S EXHIBIT NO. 66 FOR IDENTIFICATION

These defendants and each of them object to the admission into evi-

3333 dence of the foregoing exhibit on the ground that the same is irrelevant, immaterial and incompetent; and more particularly, without waiving any ground for objection not specifically stated, on the following grounds:

"1. That, as against these defendants, there is no showing as to the source, authorship, purpose, use, or transmission thereof.

"2. That the document is hearsay:

"(a) The assertions of fact contained therein do not on their face purport to emanate from the personal knowledge of the writer;

"(b) It is not a business record of defendant Byoir;

"(c) It is not an admission by the defendant Byoir;

"(d) As against these defendants, it is not a declaration in furtherance of any conspiracy.

"3. That, to the extent the document is offered to show the state of mind of Byoir, that state of mind is irrelevant, as against these defendants, to any issue in the case.

* * *

3345 OBJECTIONS OF DEFENDANTS (11), (29) AND (66) TO PLAINTIFF'S EXHIBIT NO. 67 FOR IDENTIFICATION

These defendants, and each of them, object to the admission into evidence of the foregoing exhibit on the ground that the same is irrelevant, immaterial and incompetent; and more particularly, without waiving any ground for objection not specifically stated, on the following grounds:

1. That as against these defendants there is proof of the source, authorship, preparation, transmission, or disposition of this document

3346 2. That the facts which the document is offered to prove are irrelevant to any issue in this case.

3. That the document is hearsay:

(a) It is not an admission by any party;

(b) It is not a business record;

(c) It is not a declaration in furtherance of any conspiracy.

* * *

3372 THE CLERK: Plaintiff's Exhibit No. 68 for identification.

(Thereupon work report for week ending August 8, 1952, Hutchinson, William B., dated August 12, 1952, was marked Plaintiff's Exhibit No. 68 for identification.)

3373 MR. BALL: It is understood that the same objection will go to this.

THE COURT: The same objection to this document.

* * *

3381 OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS. Plaintiff's Exhibit 66 (Document No. 27)

These defendants object to the admission of this exhibit for the following reasons:

1. For the reason that it is hearsay, irrelevant and immaterial, and for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 52 and 53.

2. For the reason that it does not constitute a business record within the meaning of the Federal Shop Book Act.

3. For the reason that it relates merely to an idea or plan of possible action with no showing that any action was taken.

3382 4. For the reason that the author of the document was in no way authorized by any of these defendants to act for them, to express opinions, or to bind them in any way.

5. For the reason that it contains incompetent conclusions, expressions of opinion, and speculations of the author, including speculations as to the mental state of employees of certain defendants.

6. For the reason that the document contains hearsay of hearsay, and hearsay of opinions.

7. For the reason that it is admitted in plaintiff's answers to Interrogatories E-II-4 and E-II-5, served July 9, 1958, by defendants Western railroads, that no defendant participated in the activities in the State of Ohio other than Byoir, ERPC, and the Pennsylvania.

8. For the reason that it is admitted in plaintiff's answer to Interrogatory E-II-1, served July 9, 1958, by defendants Western

railroads, that solicitation of action by the PUCO was not a violation of law; and for the further reason that such action was in no way inconsistent with a lawful purpose or motive and hence does not con-
3383 stitute evidence of the existence of the alleged conspiracy.

9. For the reason that to intend to produce the natural consequences of a lawful act is not to possess an unlawful intent.

10. For the reason that the said document relates solely to the exercise of rights guaranteed to these defendants by the First Amendment.

- - -

OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS.

Plaintiff's Exhibit 67 (Document No. 42)

These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibit 66.

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OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

Plaintiff's Exhibit 68 (Document No. 49)

These defendants object to the admission of this exhibit for
3384 all of the reasons stated with respect to Plaintiff's Exhibit 66 and for the following specific reasons:

1. For the reason that plaintiff has admitted in its reply to request for admissions of fact served December 1, 1959, by the AWR, et al. (requests numbered VI 37, 38, 39, and 40) that the press releases issued by the States of Indiana, New Jersey, Rhode Island, Pennsylvania, West Virginia, and Connecticut, and the City of Cleveland, Ohio, were in fact approved and authorized by the appropriate officials, and that none of these officials was an agent of any of the defendants.

2. For the reason that seeking to have publicity attributed to a third person is neither unlawful in itself nor deprives the issuer or author of such publicity of the protection of the First Amendment.

3. For the reason that assisting others in the preparation of publicity in a matter of public concern, and assisting in the distribution of publicity authorized by others, is not unlawful in itself and is within the protection of the First Amendment.

3385 4. For the reason that the giving of publicity to an official action of a state of federal governmental agency on a matter of public concern is the exercise of rights guaranteed to these defendants by the First Amendment.

5. For the reason that plaintiff has admitted (answers to Interrogatories No. 202 (10), (16), (23), (32), (36), and (38), served June 16, 1959 by defendants AWR et al.) that the American Automobile Association, New Jersey Automobile Owners, Inc., Public Utilities Commission of Ohio, the Pennsylvania Association of Township Supervisors, the New York Rural Letter Carriers, and the New York Association of Supervisors were neither co-conspirators nor the agents of any defendant in carrying out the ends of the alleged conspiracy.

6. For the reason that plaintiff has admitted (answers to Interrogatories Nos. 208 (1), (17), (18), (90), (100), (101), and (107), served June 16, 1959, by defendants AWR et al.) that Governor (now Senator) Frank Lausche, T. J. Kauer, Director of the Ohio Highway Department, A. R. Sussman of
3386 the New York AAA, Governor Shricker of Indiana, Hal Cohen of Ohio, H. A. Thompson of the Pennsylvania Association of Township Supervisors, and Frank Columbus, Chairman of Joint Legislative Board of Brotherhoods of New York, were neither co-conspirators nor agents of the defendants in carrying out the ends of the alleged conspiracy.

* * *

3394-A "OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

"Plaintiff's Exhibit 69 "(Document No. 55)

"These defendants object to the admission of this exhibit for all of the reasons set forth with respect to Plaintiff's Exhibits 49, 50, 66, 68 and _____(Document No. 54), and for the following additional reasons:

"1. That plaintiff has admitted (answer to Interrogatory 202 (24), served June 16, 1959, by defendants AWR et al.) that the Indiana County Commissioners' Association was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

"2. That the documents contain incompetent hearsay and opinions as to the nature of alleged 'arrangements' with 'the Western Railroads.' "

(and the following objections were filed by Mr. McGlothlin, as follows:)

"P. F. No. 55

"OBJECTIONS OF DEFENDANTS (11), (29) and (66) TO PLAINTIFF'S EXHIBIT NO. 69 FOR IDENTIFICATION.

3395 "These defendants, and each of them, object to the admission into evidence of the foregoing exhibit on the ground that the same is irrelevant, immaterial and incompetent; and more particularly, without waiving any ground for objection not specifically stated, on the following grounds:

"1. That as against these defendants there is no proof of the source, authorship, preparation, transmission, or disposition of this document.

"2. That, if offered to prove the truth of any matter asserted therein, the document is hearsay:

"(a) It is not a business record;

"(b) It is not a declaration in furtherance of any conspiracy."

THE COURT: Mr. Wheeler.

MR. WHEELER: This document I want to object to on the grounds which we haven't objected to before, that is, incompetency, and I also want to state a further ground which I believe I discussed earlier with Your Honor, that is, that this is a document which purports to contain conclusions of the person that made the report, that is, Mr. Hardy, whose deposition has been introduced in evidence here, and those conclusions are based, in turn, on conclusions of the witness Stull, an employee of Byoir in Ohio, so that, apparently, what Mr. Hardy was doing was making a purported report, a conclusory report, based on conclusions reached by Mr. Stull.

3396 Now, my point is that if Mr. Hardy were on the stand, he could not testify to these conclusions on the basis of Your Honor's own rulings in this case, and neither could Mr. Stull; and, therefore, what you have here is a case of elevating testimony by its own boot straps, by reason of the fact that it is here in documentary form and it is presented in evidence, whereas, if the party were presented here, or even if he were deposed on this particular exhibit, or on this particular matter, he could not testify in a manner in which this is set forth on the exhibit.

So that you have, one, a hearsay objection; and, two, the fact that this is replete with conclusions, one of Hardy, and two, of Hardy and Stull.

Now, we also know from the record, from the documents that plaintiff introduced here, I think Plaintiff's Exhibit 39, which was the transcript of the citation proceedings before the Ohio Commission, and that what is concluded here, a conclusion drawn by Mr. Hardy, is not correct.

3397 We also have from the pleadings filed by the plaintiff in that same Ohio citation proceeding, further evidence that the statements here, the conclusion drawn by Mr. Hardy is incorrect. And we have the further fact that the plaintiff has taken an interview of Mr. Stull, a recorded interview unknown to Mr. Stull, and in that interview Mr. Stull denies what is said here.

For all these reasons, I don't think this is proper evidence to put before the jury, and I am referring specifically to the portion of this document that relates to Ohio.

THE COURT: Now, Mr. Wright, why do you say the document is admissible? What is your contention?

MR. WRIGHT: This document, if the Court please, is Mr. Colburn Hardy's report, the witness' report, to the Public Relations Committee of Competitive Transportation of the Eastern Railroads Presidents Conference, and that, of course, is the precise committee which hired Byoir to do the job that Hardy was engaged in doing and that Stull was engaged in doing under Hardy's supervision.

Now, this is a report made by Mr. Hardy for the purpose of informing the client as to what Byoir was doing with respect to this account; not only with respect to what Hardy was doing but with respect to those over whom he
3398 had supervision were doing; and as such it is clearly the best conceivable evidence, a contemporaneous written report made at the time, September 25, 1952, as to what he told this defendant ERPC that they were doing, and also the C&O Railroad. If I limited that offer to --

3398 THE COURT: This is limited to Byoir and also to C&O?

MR. WRIGHT: Actually, it should include ERPC, as well, because it does appear, and it has appeared from the prior interrogatory answers that were read, that executives of the C&O Railroad were members -- I think specifically Mr. Deegan was a member of the sub-committee which hired Byoir.

* * *

3400 THE COURT: All right, the document will be admitted.

The weight to be given to the document, of course, will be for the jury to determine.

This is admitted in this case, and the jury will consider what weight they will give to the document.

* * *

DEPOSITION OF C. COLBURN HARDY READ BY MR. WRIGHT

3406 "Q. In addition to these local railroad committees that you made contact with, did you have any contact with the Association of Western Railroads?

3407 "A. Yes, sir. I wouldn't say contact with them as such. I know Joe Hayes and Hal Sims.

"Q. They were --

"A. Those were personal contacts.

"Q. Who were they?

"A. I am not sure of their exact title, but Sims is the public relations director and Hayes is the -- I don't know what his title is but at any rate he is very active in the Association there.

"Q. When did you first meet them?

"A. I am not sure. It seems to me I met them at some railroad meeting back around '50 or '51.

"Q. Do you know what the occasion for the meeting was?

"A. No, it was just some cocktail party type meeting.

"Q. Well, what was the nature of your relations with them?

"A. Very friendly.

"Q. What business if any did you transact with them?

3408 "A. After Girdler left, I went out to talk with Hayes and try and find out, get a lot of information from him. He had been active in this business a long time, doing an excellent job in publications, and I had just casually met him and I thought it would be a good idea to get to know him better, which I did. I spent about one full day with him. And then I would see him -- if I went to Chicago, I usually called him, had lunch with him, something like that.

"Q. When you say "this business," you are referring to the kind of public relations program you were engaged in conducting.

"A. The whole problem of railroad and highway economics.

"Q. Was there any effort made to coordinate the activities of that Association of his with what you were doing?

"A. No. We determined that it would not be -- just was not practical from an operating standpoint. But we did keep each other informed.

"Q. You also had a branch office in Chicago, did you not?

"A. Yes, sir.

"Q. Did that office have anything to do with this program?

3409 "A. No sir, not that I recollect.

"Q. Whatever was done, then, in the middle west by the lines you were working with, was done through the Association of --

"A. We did nothing out there at all. It was their territory, so we stayed out of it.

"Q. But you were aware of the fact that the Association of Western Railroads was carrying on a similar program in that area, is that right?

"A. They were as interested in telling the public about the highway damage and costs and financing as we were. They were doing it in a little different way.

"Q. And did you discuss with them your program and theirs on a fairly regular basis, didn't you?

"A. No, sir, I wouldn't say that.

"Q. When you met them, you didn't talk about that?

"A. Of course we did. But they have a regular informational bulletin which they send out, which is photostated. It is very good. And we did not have such a means of information. So when anything significant happened, we got any newspaper clipping or stories or anything else which was of mutual interest, we generally sent it out to all our committee and added on the names of Hayes or Sims or whoever it might be.

3410 "Q. You say you got from them regularly some publication that they issued -- how often?

"A. I would imagine about once a month. It apparently isn't regularly issued.

"Q. Who got that besides you?

"A. Thousands of people.

"Q. What was it called?

"A. I don't know.

"Q. But this was generally circulated and published material.

"A. That is right. It was a news digest. It showed photostatic clippings of various news stories, things like that.

"Q. Now, that, you say, provided you with a regular account of their activities in this field.

"A. No, not necessarily that. It acquainted us with what was happening in the western states in this problem of highway financing.

"Q. Well, didn't it also tell you what they were doing, if anything?

"A. No, because we -- it was of no great interest to us.

3411 "Q. And did you make any regular reports to them in the form of general circulated material or otherwise as to what you were doing?

"A. Oh, no. There would be no reason to.

"Q. That is nothing in writing?

"A. No.

"Q. But you would, I take it, when you saw them, tell them about what you were doing.

"A. Well, as a matter of conversation. But they were not probing into our affairs and we were not probing into theirs. We were just interested in any factual information which each of us could make available to the other.

"Q. And I take it you were both dealing with a common problem, but in different areas. Isn't that what it came down to?

"A. That's right, sure.

"Q. Now, on this question of what reports were made, you say you made no reports of any kind to the western railroads as to what Byoir was doing in the field.

"A. No.

"Q. And the only reports you got from them was this general circulated material.

3412 "A. That is right.

* * *

3418 "Q. And you say you would have a monthly meeting with the people in the public relations committee, and that would be whom?

"A. Well, Mr. Deegan and his committee.

"Q. Would you always meet with the full committee or just certain designated representatives?

"A. No. In other words, the full committee would be called. They would not all be present.

"Q. It would be a formal committee meeting?

3419 "A. Yes, sir.

"Q. Who else beside Deegan attended those meetings?

"A. Mr. Blosser, Mr. Frank.

"Q. Anyone other than those people you mentioned before?

"A. No. I would say those people. I don't remember anyone else.

"Q. You say those meetings would occur once a month?

"A. That is right.

"Q. And your reports that were made then were made orally, were they?

"A. Usually, As far as I know, yes, always.

"Q. Wouldn't you make any memorandum or would there be any written record at all of what was reported?

"A. There might be. But I mean it wasn't that formal. We would tell them -- sit down, say 'Look, here is what happened. Here are some newspaper clippings,' or whatever it might be.

"Q. Well, the substance of what you told them was everything you were doing that you thought was worth mentioning in connection with the account, is that correct?

"A. That is right.

3420 "Q. But you say there may or may not have been a written record. That was just a catch-as-catch-can proposition.

"A. That is right.

MR. WRIGHT: Now I will turn to page 158 at Line 8:

"Q. Well, when was it you were first asked to do anything about explosives?

"A. I don't know, but I'm sure it's in the record.

"Q. The request came from the client?

"A. Yes, sir.

"Q. And did it come direct to you?

"A. We were at a meeting, and as a result of the meeting we were asked to get into this explosives situation and learn a lot more about it and see what could be done as a matter of informing the public.

"Q. Where was this meeting?

"A. I think it was at the Cloud Club but I'm not sure.

"Q. Here in New York?

"A. Yes, sir.

"Q. Who was present? Do you know?

"A. Among others, Mr. Swinehart, Mr. Deegan, Mr. Frank. I think Mr. Edgar. And I think Mr. Skidmore too but I'm not sure about it. Mr. Blosser was there. Mr. Blosser is the New York Central. And Champ of the Pennsylvania.

3421 "Q. All of these gentlemen were members of this public relations subcommittee, were they?

"A. That's right.

"Q. Who else was at the meeting beside them? Who from Byoir beside yourself?

"A. Swinehart and myself. I think those are the only ones that were there.

"Q. This was before or after Girdler left?

"A. After Girdler left, and I think Mr. Lyon was there.

"Q. This would be sometime then what? In 1952?

"A. I don't know. You'd have to check in the records.

"Q. Latter part of 1951, do you think?

"A. No, it was later than that.

"Q. Early 1952?

"A. I think it was later than that.

"Q. When was it Girdler left?

"A. The end of 1951. So I -- Maybe this was 1952. I don't know.

"Q. Anyway, it was, you think, sometime in 1952?

"A. I think it was 1953, but I may be wrong a year. I don't know.

3422 "Q. Might have been before that?

"A. That's right.

"Q. And what was said at this meeting as nearly as you can remember about this need for an explosives program?

"A. They said that there was a great deal of public interest in the problem of hauling explosives on the highways, that there had been a --

"Q. When you say 'they,' you are talking about the railroad representitives?

MR. McGLOTHLIN: I object to the second sentence in the next answer.

MR. WRIGHT: What?

THE COURT: I will sustain the objection. I don't think it is definite enough. You object to Line 7?

MR. McGLOTHLIN: The sentence that begins half way through Line 7. I have no objection to the first sentence of the answer.

THE COURT: You have no objection to the words "Somebody at the Meeting."

MR. MCGLOTHLIN: That's right. No objection to that.

THE COURT: All right. I will sustain your objection.

MR. WRIGHT: (Continuing to read the deposition:)

"Q. Go ahead.

3423 "A. They said that some of their people had wondered if we could be helpful to them in getting their side of the story over to the public, particularly with regard to the ICC hearings. I don't remember the specific cases, but there were a series of them which had concluded -- it's my recollection they had concluded at that time -- and we said, 'If we're going to do anything on this, this is a full-scale program, needs a lot of research and a lot of information, and we'll need more manpower to do it.'

"And my recollection is that Swinehart turned to Mr. Deegan and said, 'How about giving us a little more money to go ahead on this?' Deegan says, 'Is it all right, fellows?' And they had a formal vote, and we were given more money which enabled us to spend more money for a man working on that.

"Q. And part of that money was the money that went to hire Devine?

"A. No, he was hired before. But he was assigned to this thing later.

"Q. After he was hired, he was assigned full time to this explosives program?

"A. No, he was assigned to it part time.

"Q. Part time?

"A. Yes.

"Q. Now, was there any discussion as to the amount of this appropriation, this extra money, that would be devoted to an explosives program?

3424 "A. I don't recall, but I'm sure that knowing these gentlemen there was a definite limit on it, but I don't recall what it was.

"Q. Was there any record made of this meeting that you know of?

"A. I don't know, but obviously there must be.

"Q. Well, by the Byoir Company?

"A. I don't know.

"Q. You don't know whether there is any record in the Byoir files?

"A. No.

"Q. Of what transpired at the meeting?

"A. No.

"Q. You have never seen one?

"A. No, sir.

"Q. On these occasions when you did add to your duties there or embark on an additional specific program, wasn't it your practice to exchange some sort of written memoranda which would indicate what the scope of the program was to be?

"A. That wouldn't be my responsibility. I have no knowledge of it.

3425 "Q. Well, I'm asking for your knowledge as to what the practice was generally when you did take on an additional project there. Wouldn't you normally have some exchange of correspondence that would outline what the additional work was that you were to do and what the additional amount of money was that the client was being committed for?

"A. It's the only occasion I know of that it happened since I have been there where I have had any knowledge of it, and I have no knowledge of it.

"Q. Well, then, your experience with Byoir, if that occurred wouldn't it be normal practice to have some sort of a written memorandum which would indicate the extent of the additional program and the additional money commitment?

"A. It might be, but I would have no knowledge of it. It's the only time I've ever had a situation occur, and I have no knowledge of it.

"Q. And you don't have any recollection whatsoever as you sit here of whether or not there were such memoranda or not?

"A. I have no recollection of it.

"Q. And you have never seen any such memorandum?

"A. I don't remember it.

"Q. If you have seen it?

"A. That's right.

3426 "Q. When would be the time you saw it if you had?

"A. I suppose afterwards, but I have no recollection.

"Q. You don't know when you might have seen it either?

"A. No.

"Q. And all you can tell me about the conversation itself is what you have just said here? How long did this meeting last?

"A. I think we were there all day, and this happened right towards the end. In fact, my recollection is a couple of people had their hats and coats on.

"Q. This was an all-day meeting devoted to something else you say?

"A. Well, we met --

"Q. This just was a kind of an after-thought?

"A. No, --Well, we were having -- It was a regular monthly business -- It was a long meeting anyway.

"Q. Now, how much of the meeting was devoted to a discussion of this explosives program?

"A. Oh, one tiny one one-hundredth of one per cent.

"Q. I don't care about it in percentage terms. If you can give me some time it would be helpful.

"A. I suppose at the most five minutes.

3427 "Q. And in the course of that five minutes it was then determined that you would engage in this explosives program and hire additional personnel to carry it out? Is that right? And the --

"A. Well, you're implying things that aren't quite so.

"Q. I don't want to imply anything. I just want to know what happened.

"A. We were given the green light, if you will, in going ahead on this program, and then we were to use our best judgment on how it should be handled.

"Q. Well, this program was outlined to you in the space of five minutes? Is that right?

"A. It wasn't a program. It was a committment or green light to go ahead.

"Q. Well, whatever was to be done, it was told you in this five-minute conversation? Is that it?

"A. We were told to contact other railroad men who would know the story and the facts about the situation.

"Q. Well, now, who were these other railroad men that you were told to contact who would fill in the details for you?

"A. One was Lou Wickes of Pennsylvania Railroad, and Frank Masterson. I don't know what group he's with, but it's the Railroad Traffic Executives or something like that. I don't know what the name of it is. And Walter Renz, Lehigh Valley; and there may have been some others there too, but those were -- Wickes was the key person with whom we had contact.

3428 "Q. Those were the only ones you recall? How about Mr. Littlefield? Was he supposed --

"A. No.

"Q. Was he supposed to have anything to do with that?

"A. I don't believe he had any --

"Q. Or Mr. Hill?

"A. Yes, Ed Hill.

"Q. So the ones you recall then are Mr. Wickes and Mr. Hill and Mr. Renz and --

"A. And Mr. Masterson.

"Q. -- and Mr. Masterson?

"A. Yes.

"Q. No others that you can recall now?

"A. It seems to me we did meet with someone else, a chubby fellow, but I don't remember his name.

"Q. How about those people in the Western Association, Hayes and Sims? Were you supposed to get in touch with them?

"A. No, sir.

"Q. In connection with this program?

3429 "A. No, sir.

"Q. You're sure they weren't mentioned?

"A. That's right.

"Q. And then you did get in touch, did you, with these people that were mentioned at the meeting -- the railroad people that you just named?

"A. As I recall it, the procedure was Dick Strouse, who worked for me, was assigned the job of putting this together and finding out what could be done.

"Q. Now, when was that assignment made?

"A. Right after the meeting.

"Q. That was an assignment made by you?

"A. That's right.

"Q. What had Strouse been doing up to then?

"A. He was sort of managing editor.

"Q. Of what?

"A. of the railroad account.

"Q. When you say 'managing editor,': all of the publicity material cleared through him?

"A. Pretty much.

"Q. And he wrote part of it?

"A. That's right.

"Q. Or rewrote part of it?

"A. Yes.

3430 "Q. Well, then was this assignment given to him in addition to those duties?

"A. That's right.

"Q. And when you made the assignment, what did you tell him he was supposed to do?

"A. To get together with these people and find out first what could be done, and (2) what should be done, and (3) suggest what we might be able to do about it.

"Q. And then he made a subsequent contact with them?

"A. Yes. Over the next month or two we met several times. Usually he'd mett with Wickes or Ranz or whoever he was meeting with, and maybe I'd come in on the beginning or end of the conversation. I was in on several meetings altogether. But basically Strouse was packaging up the material and finding out the information which we needed."

* * *

3432 "OBJECTIONS OF DEFENDANTS (11), (29), AND (66) TO PLAINTIFF'S EXHIBIT NO. 70 FOR IDENTIFICATION.

"These defendants and each of them object to the admission into evidence of the foregoing exhibit on the ground that the same is irrelevant, immaterial, and incompetent; and more particularly, without waiving any ground for objection not specifically stated, on the following grounds:

"1. That, to the extent the document is offered to show the state of mind of defendant Byoir or any agent thereof, that state of mind is irrelevant, as against these defendants, to any issue in the case.

3433 "2. That the document is hearsay:

"(a) It is not a business record of defendant Byoir or of defendant (66);

"(b) It is not an admission by defendant Byoir or by defendant (66);

"(c) As against these defendants, and in particular as against defendants (11) and (29), it is not a declaration in furtherance of any conspiracy."

"OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS, Plaintiff's Exhibit 70, (Document No. 33).

"These defendants object to the admission of this exhibit for all of the reasons stated as objections to Plaintiff's Exhibits 66, 68, and _____(Document 28) and for the further reasons:

"1. That the said document contains incompetent opinions, conclusions, and speculations of the author.

"2. That the document contains the opinion and conclusion of the author as to the relationship of the AWR and the Highway Conservation League, which opinion and conclusion was necessarily based on hearsay, in no event is binding upon these defendants, and is contrary to the admission referred to hereafter.

"3. That it is admitted by plaintiff (Answers to Interrogatory No. 202) (48) served June 16, 1959, by defendants AWR et al.

3434 That Highway Conservation League was neither a co-conspirator nor an agent of the defendants in carrying out the ends of defendants' alleged conspiracy.

"4. That the document mentions an agreement to invite Mr. Young of the Southern Railroad and Messrs. Sims and Hays of the Western Association to future meetings, which passage is wholly incompetent as to these defendants, it not being shown that any such invitation was extended or brought to the notice of these defendants or that such persons ever attended any such meetings.

"5. That the document states that those present at the meeting 'agreed' to meet with the lawyers handling the ICC cases and plan a campaign of publicity, all this to be done 'insofar as possible in cooperation with the Western Association'; and this passage is wholly incompetent as to these defendants and highly prejudicial, it not being shown that such 'agreement' was ever brought to the attention of counsel representing these defendants or that the AWR cooperated in any manner in any campaign as outlined."

* * *

3436 MR. SHEA: Is there any claim on his part that this isn't hearsay, and if it is hearsay, what specific exception to the hearsay rule is he proposing to get this in under, and, specifically, as to 8, on what basis is he getting in here a statement of a proposal of what they may do in the future? And, is he suggesting that that is any proof that anything of that kind was done?

THE COURT: You may state your reasons why you think the document is admissible, and I will rule on it.

MR. WRIGHT: This document, if the Court please, is admittedly an accurate true copy of the report made by C. Colburn Hardy to Mr. Littlefield, an employee of the Pennsylvania Railroad who functioned as chairman of one of the railroad research committees, made on this date. Now, it is offered for exactly what it purports to be, the report of that meeting made by Mr. Hardy to Mr. Littlefield.

THE COURT: All right.

MR. SHEA: Now, if the Court please, Mr. Wright is not responding to the real issue here, and he is not specifying on what ground he is asking that hearsay be admitted.

I wish Your Honor would inform the Jury that the reason for the
3437 hearsay rule is that, in general, rumor is untrustworthy, and, in general, what a man says someone told him is a kind of evidence that the Courts feel a Jury should be protected from because it isn't subject to the kind of tests, such as cross-examination, which normally is required --

THE COURT: I understand -- I think the jury understands that. I think the jury knows what hearsay evidence is. They will give this document the weight they think it is entitled to. Objection overruled.

* * *

3438 BY MR. WRIGHT: I will ask to have marked for identification a document which is on the pretrial list as Number 62, which this testimony I am about to read relates to.

MR. McGLOTHLIN: What was that number, please?

MR. WRIGHT: 62.

MR. BALL: If the Court please, can we reserve the right to file our objections?

THE COURT: You may have the right.

MR. McGLOTHLIN: I also reserve the right.

* * *

3439 MR. WRIGHT: I ask to have that marked with the next number.

THE DEPUTY CLERK: Plaintiff's Exhibit Number 71 for identification.

(Plaintiff's Exhibit Number 71 was marked for identification: Letter from C. Colburn Hardy to D. I. Mackie, dated Jan. 7, 1952.)

* * *

3442 "OBJECTIONS OF DEFENDANTS AND ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS, Plaintiff's Exhibit 71 (Document No. 62).

"These defendants object to this exhibit for all the grounds
3443 stated with respect to Plaintiff's Exhibits 49, 50, 66 and 68, and for the further reason that the letter standing alone is ambiguous and confusing in its references to 'lawyers.'"

* * *

3444 "Q. Now, in the next paragraph of this letter that I showed you, of January 7, to Mackie, you say 'We are very anxious to do something on this, but feel there must be a set policy and if possible some sort of uniform legislation.'

"Now, can you tell me just what, if anything, was done to set a policy in that connection.

3445 "A. Nothing was done for varying reasons -- no uniform policy was set, and no uniform legislation was drawn up or decided upon. So we felt we had no directive to continue.

"Q. Can you tell me how that came about, that you did not do what you said you were anxious to do in that paragraph.

"A. Because there was no uniform policy and no uniform legislation.

"Q. Yes, I understand. You say that that did not happen. I am now trying to find out why.

"A. I don't know. That was up to the railroads' decision.

"Q. Well, do you remember when it was decided that there would not be any uniform policy or any uniform legislation?

"A. Perhaps I can explain it better for your benefit this way. The railroad association in each state is the final factor in making any decisions on what shall be done in that state as regards legislation or any other activity which we carried on.

"Q. I understand that from your prior testimony.

"A. Now, for reasons of which I am not aware, the railroads did not feel it worth while to call all these people together, bring up this problem and continue and make some policy or take some action. We did not go into any state unless we were asked to do so. In this case, we were not asked to do so in any state."

3446 MR. WRIGHT: The next part of the deposition is at Page 380.

THE COURT: Suppose we take our morning recess at this point.

(Short recess.)

THE COURT: All right.

MR. WRIGHT: If the Court please, I am going to continue reading on Page 312. I left off with the answer that ended on Line 11, and on 312 there is further colloquy with respect to the last paragraph in the letter, and I am now going to now read that. (Reading:)

"Q. Now, the last paragraph says: ' I am sure that if we can get the proper railroad people together, we can get this worked out. ' Now, there were some efforts, I take it, to get the proper railroad people together.

"A. As far as I know, no.

"Q. You did not even get together with them or attempt to work the matter out?

"A. No, sir.

"Q. And that was because somebody told you that they wanted only a state-by-state program in that connection?

3447 "A. No, they just decided apparently that they wanted no program as far as the states went.

"Q. Now, you mention that somebody, some railroad representative, told you that they had decided not to sponsor or support any state legislation in this connection.

"A. N, sir. What I said was that the railroads did not ask our assistance in providing information on a state-by-state level.

"Q. Well, what they told you, then, was that they would handle that state legislation themselves, is that right, except as they might call on you for some specific help. Is that the substance of it?

"A. They did not tell us that, but the effect was that."

* * *

DIRECT EXAMINATION OF LEWIN W. WICKES BY MR. WRIGHT

3454 "Q. When was the first time that you become involved in a substantial way in a motor carrier case?

"A. September of 1951, in the series of truck applications for authority to transport explosives which included Riss and Company, MC 200, Sub 84, and some sixty others.

"Q. When were you first assigned to that case?

A. My first assignment to that case was late in 1951.

3455 Q. How late?

A. My recollection is, sir, that it was sometime in August.

Q. You were present throughout the hearings, were you?

A. When the hearings finally came on I did not attend any -- I did not attend a number of the first days or weeks.

Q. Did you attend the preliminary meeting in Chicago for what I believe you call a Defense Committee, sir?

A. Yes, sir.

Q. And you participated in that. Am I correct in the name of the committee?

A. I can probably get at it chronologically this way: My first assignment to the case was to attend a meeting in New York at 1 Park Avenue of representatives of the Eastern Railroads concerned with the preparation of their testimony.

Q. Excuse me. What was 1 Park Avenue?

A. This was the offices of the Traffic Executives Association of Eastern Railroads.

Q. Go ahead. I didn't mean to interrupt you.

3456 A. At that meeting there were only representatives of a number of Eastern Railroads; the purpose in my attendance was that I had been assigned by Mr. Cousins, who was representing the east in the Government Reparations cases, and was Chairman of the Defense Committee in the East, to ascertain whether there was any conflict between the position or evidence proposed to be taken by the railroads in the truck cases, as compared with the position and evidence that had been introduced in the reparations cases.

Q. Do you recall what other eastern railroads were represented at this meeting of the Traffic Executives Association offices?

A. No, sir.

Q. Then that, you say, was sometime when, of the Spring of '51?

A. No, that was very late in 1951. That was late summer or early fall. It was not too far before the meeting which I believe you refer to in Chicago, which if I remember right it was in September.

Q. That is what I wanted to get, was the sequence of the meetings. This one in New York was prior to the one in Chicago?

A. That is right, sir.

3457 Q. Then at the Chicago meeting there was, was there not, a committee formed to conduct the presentation of the railroads cases in connection with the Riss proceeding; is that right?

A. There was a committee formed on which I was asked to serve to present specifically railroad operating testimony. Apparently I was selected or requested to do that because of the connection that I had had with substantially the same kind of evidence covering the hearing prior to that time.

Q. Now who were the other members of that committee?

A. The other members named at the meeting were the Northern Pacific or the Great Northern, and specifically Robert Cronon, and the Southern Pacific without any named representative.

Q. Now there was, that was really, was it not, only one of a number of committees that were then formed to present various aspects of the railroad, the testimony of the railroads which they were offering in those cases?

* * *

3458 A. The committee requested to handle the operating side of the thing from the railroad point of view was the only one that I remember being specifically associated with; and at this time my assignment was unclear in any event. I was really there as observer or liaison officer with the other committees handling the reparations cases.

3459 Q. Well, you do recall, don't you, that there was another committee formed at that time to obtain the so-called public witnesses to testify at the hearings?

A. I don't remember any committee formed for that purpose.

Q. You say Mr. Joseph Hays was out there?

A. Yes.

Q. You don't recall that he was assigned or put in charge of that work?

A. No, I do not.

Q. That work wasn't discussed with you at that time; is that correct?

A. I was at the meeting. There were about seventy other people there and a great deal of business was conducted in a very short time, sir.

Q. Now, when was the first time that you had any contact with the Byoir Company?

A. In January, 1952.

Q. Prior to that time -- well, what was the occasion for the contact?

A. The occasion for the contact was that in the course of the hearings in the motor carrier explosives cases, which were by then going on in Washington --

Q. Excuse me. That included this same Riss case, did it not?

3460 A. That is right.

Mr. Walter Renz advised me that an organization by the name of Carl Byoir and Associates had been employed by some of the Eastern Railroads to carry on public relations for those railroads; and after discussion primarily with Mr. Renz, it was decided that I should suggest to the Pennsylvania Railroad public relations people that it might be useful to consider whether there was public relations materials or public relations aspect in the then proceeding cases that Byoir might do something about.

I had never heard of Byoir before this, and I had no specific ideas as to what they might do.

Q. Who was the first Byoir employee that you had contact with?

A. My first contact with anyone at Byoir's specifically was with Mr. Byoir.

Q. And when was that?

A. This was within a day or so of the time of the conversation that I mentioned.

Q. And then was Mr. Byoir himself actively engaged at that time in this program Mr. Renz is described in, sir?

3461 A. I don't know whether he was or not. I had been advised that I would be contacted by some individual from Byoir, and since I was not I called Mr. Byoir to find out why not.

Q. And then after you talked to him what was the next Byoir representative you met?

A. Within a short time a man named Don Stull. He came to my room at Lafayette Hotel and introduced himself.

Q. You were down here at that time, were you, in connection with the Riss hearing?

A. Actively engaged in the handling of the Riss hearings.

Q. And the date as nearly as you can fix it was what?

A. Mid-January of 1952.

* * *

DIRECT EXAMINATION OF MR. WICKES BY MR. WRIGHT

3474 Q. Well, was there some other controversy between the Pennsylvania Railroad and Riss & Company that it was supposed to help you with?

A. There is a general controversy, as I understand it, and I have not been engaged in the general controversy particularly, between the big trucks and railroads, concerning the extent to which trucks are subsidized and ride on the public highways at the expense of the taxpayer. This controversy --

Q. Now, I didn't ask you for a speech.

A. Let me complete --

THE COURT: Let him finish his answer.

THE WITNESS: It was my understanding that information was useful in connection with that controversy.

* * *

3484 Q. And you entered that proceeding solely because you thought it would best serve your interest to enter it; is that correct?

A. Well, in answer --

MR. BALL: I object to this question because it has been admitted in the pre-trial repeatedly that the Pennsylvania Railroad and the others had a perfect right under the law to intervene in this proceeding.

THE COURT: I think it is conceded. I mean, everybody knows that the railroad has a right to intervene in a proceeding if it has an interest in the proceedings.

Let's proceed.

BY MR. WRIGHT:

3485 Q. The purpose of your entering the proceeding was, then, in substance, to prevent Riss & Company from continuing the competition with your railroad that was then existing, was it not?

THE COURT: Just a minute.

MR. McGLOTHLIN: Your Honor, if Your Honor please, it seems to me entirely improper to probe into the purpose for intervention in an I. C. C. proceeding, or any other administrative agency proceeding.

For example, it is exactly the same thing if Mr. Wright would ask me why I am here, in the interest of the Pennsylvania Railroad. Of course I am. Now every citizen, everyone affected by an application before the I. C. C. has a right to go there and present evidence before that tribunal, to be tested before that tribunal, and ruled on by that tribunal.

To cast any aspersions or to bring into question here the purpose why you do it, seems to me to be entirely wrong, and it is an improper inquiry before this Court.

THE COURT: If I understand the theory of the plaintiff's case, and I have gone over this many times, they don't take the position, as I

understand the plaintiff's position -- and you correct me if I am wrong --

And I want to again caution the jury, any time the Court makes a statement, you are not to be swayed one way or the other. I am trying to find out the position of the parties, which I think I know, trying to have them stated.

3486 The plaintiff has never contended that the Pennsylvania Railroad, or any railroad, never had the legal right to intervene in these proceedings.

They are trying to show that the reason they intervened was for an illegal purpose; that it was pursuant to a conspiracy or combination in restraint of trade.

That is their theory, isn't it?

MR. McGLOTHLIN: I know nothing about their theory.

THE COURT: Isn't that your position?

MR. WRIGHT: Yes, of course, Your Honor.

* * *

3487 THE COURT: I am going to let the jury consider it. Objection overruled.

You may state your objection.

BY MR. WRIGHT: * * *

3509 Q. Well what was the occasion for making the telephone call to Mr. Stull on August 1st?

A. The occasion, I believe, was to find out the scope of the complaint. I had seen only the press release, and had not read precisely what was sought. My feeling then was -- and I expressed this to Mr. Stull -- that if the Public Utilities Commission of Ohio specifically sought the cancellation of temporary authorities held by Riss to handle explosives, that the matter could be considerably expedited. And this I think was the suggestion I made to Mr. Stull, if he knew of any way to pass it on.

* * *

3536 (Objections of Defendants 11, 29 and 66 to Plaintiff's Exhibit No. 75 are as follows:)

"These defendants, and each of them, object to the admission into evidence of the foregoing exhibit

3537 on the ground that the same is irrelevant, immaterial, and incompetent; and more particularly, without waiving any ground for objection not specifically stated, on the following grounds:

"1. That the facts which the document is offered to prove are irrelevant to any issue in this case.

"2. That, if offered to prove the truth of any matter asserted therein, the document is hearsay;

"(a) It is not an admission by a party;

"(b) It is not a business record;

"(c) It is not a declaration in furtherance of any conspiracy.

"In addition, defendants 11 and 29 object on the ground that as against them there is no proof of the source, authorship, preparation, transmission, or disposition of this document."

(Objections of Defendants The Association of Western Railways and the individual Western Railroad defendants are as follows:)

"Plaintiff's Exhibits 75, 75-A, 75-B, and 75-C.

3538 (Document No. 57)

"These defendants object to these exhibits on all the grounds set forth with respect to Plaintiff's Exhibits 49, 50, 66, and 68, and for the further reason that plaintiff has admitted (answer to Interrogatory 208 (20), served June 16, 1959, by defendants AWR, et al.) that Paul Deaton of PUCO was neither a co-conspirator nor an agent of any defendant in the carrying out of the alleged conspiracy."

(Whereupon Plaintiff's Exhibits 74 and 75 were received in evidence.)

* * *

3551 (Objections of Defendants 11, 29 and 66 to Plaintiff's Exhibits Nos. 76, 76-A, 77, 78, 79, 80, 81, 82, 83, 84 and 85 are as follows:)

"These defendants, and each of them, object to the admission into evidence of the foregoing exhibits on the ground that same are irrelevant, immaterial and incompetent; and more particularly, without waiving any ground for objection not specifically stated, on the following grounds:

"1. That the facts which the documents are offered to prove are irrelevant to any issue in this case.

"2. That if offered to prove the truth of any matter asserted therein, the documents are hearsay:

"(a) They are not admissions by a party;

3552 "(b) They are not business records;

"(c) They are not declarations in furtherance of any conspiracy."

(Objections of Defendants the Association of Western Railways and the individual Western Railroad Defendants are as follows:)

"Plaintiff's Exhibits 76, 76-A

"(Document No. 58)

"These defendants object to the admission of these exhibits for all of the reasons set forth with respect to Plaintiff's Exhibits 49, 50, 66 and 68.

"Plaintiff's Exhibit 77

"(Document No. 59)

"These defendants object to the admission of this exhibit for all of the reasons set forth with respect to Plaintiff's Exhibits 49, 50, 66, 68 and 75 (Document No. 57).

"Plaintiff's Exhibit 78

"(Document No. 60)

"These defendants object to the admission of this exhibit for all of the reasons set forth with respect to Plaintiff's Exhibits 49, 50, 66, 68 and 75 (Document No. 57)

3553 and for the further reason that plaintiff has admitted (answer to Interrogatory 208 (21)) that Commissioner Moulton of the PUCO was neither a co-conspirator nor an agent of any defendant in the carrying out of the alleged conspiracy."

* * *

3557 THE COURT: All right, 75-B will be admitted.

(Whereupon Plaintiff's Exhibit No. 75-B was received in evidence.)

MR. McGlothlin: Your Honor, the objections I filed would not cover 75-B. I would like to amplify it.

THE COURT: It will cover that. All right.

BY MR. WRIGHT: * * *

3567 Q. And those Commissioners you refer to there, Moulton and Miller, were both Public Utilities Commission of Ohio Commissioners?

A. That's right, sir.

Q. I show you this letter that is dated October 27, 1952, from you to Messrs. Nisbet, Steinbrecher and Masterson, that has been marked for identification as Exhibit 79, and ask you if you recognize that as one you wrote to those gentlemen on or about that date?

3568 A. It is.

MR. WRIGHT: I now offer that in evidence against the Pennsylvania Railroad. I don't believe copies have been served on the other defendants.

THE COURT: Plaintiff's Exhibit 79 is offered against the Pennsylvania Railroad.

Is there any objection?

MR. McGLOTHLIN: I have filed mine.

THE COURT: You filed your objection.

MR. McGLOTHLIN: Yes.

THE COURT: All right.

(Thereupon Plaintiff's Exhibit No. 79 was received in evidence.)

MR. WRIGHT: Would you read that letter of yours, Mr. Wickes?

MR. McGLOTHLIN: Could I approach the bench, Your Honor?

THE COURT: Surely.

(Thereupon counsel approached the Bench and the following occurred:)

3569 MR. McGLOTHLIN: I don't understand this procedure. We have a witness on the stand. The point he wants to make, apparently, is that he met a Mr. Deaton and went to Ohio, and I thought the way to do that is to ask him and if he can't remember it, then show him the document, and say "Does this refresh your recollection?"

We might as well not have this witness on the stand. He is just shoving documents in front of him.

As a matter of fact, the documents, of course, are technically hearsay. This is just a letter written. You have the witness on the stand subject to actually cross examination in the initial instance.

MR. WRIGHT: He is subject to cross examination.

THE COURT: Maybe he hasn't finished yet. Maybe he wants to identify the letter and then cross examine him on the letter. I don't know.

MR. McGLOTHLIN: He should bring the facts out to ask the witness questions, it seems to me.

THE COURT: I don't know what he will do.

MR. McGLOTHLIN: That's the way it has been with the last eight documents, Your Honor. That's what I am basing it on.

THE COURT: He is identifying the documents.

Whether he will rely on the documents speaking for themselves, or whether he will ask him some questions about various things in those documents -- I don't know what he is going to do.

3570 MR. WRIGHT: I learned very quickly this morning, Your Honor, I couldn't ask him a question without getting a speech.

I have to get these facts.

THE COURT: I will let him proceed that way.

MR. McGLOTHLIN: Over my objection.

THE COURT: Yes, over your objection, Mr. McGlothlin.

(Thereupon counsel resumed their places in the courtroom and the following occurred:)

THE WITNESS: This is Plaintiff's Exhibit 79, addressed: "Re: Ohio Complaint."

Addressed to Mr. Nisbet, Association of Western Railroads, Union Station Building, Chicago, Illinois;

Frank J. Steinbrecher, Esq., Santa Fe Railway System, 1211 Railway Exchange, Chicago 4, Illinois;

F. X. Masterson, Esq., Motor Carrier Bureau, 1 Park Avenue, New York 16.

"Gentlemen:

"I have just received a copy of Riss' answer filed with the Interstate Commerce Commission, which I enclose for your file.

"I had an opportunity in Washington to talk to Paul Deaton, Secretary of the P. U. C. O., and later to Commis-
3571 sioner Miller of the P. U. C. O. Miller, and this somewhat surprised us, was very receptive indeed to our suggestion with respect to the TA. In view of this Deaton suggested that I trek to Columbus and talk to Commissioner Moulton, and indicated that it would be well to make this as soon as possible.

"In contrast to the attitude Stull indicated, Commissioner Miller's approach was quite militant."

Signed by myself.

BY MR. WRIGHT:

Now, I am going to show you, Mr. Wickes, the document that has been marked as Plaintiff's Exhibit 82 for identification, a letter from Mr. Nisbet of the AWR to you dated October 30, 1952, and ask if you recognize that as the letter you received from him on or about that date, or shortly after the date it bears?

A. My guess is that it is a copy of a letter I received.

Q. Well, in any event it is -- you have no reason to doubt, do you, that you received the original?

A. No, sir.

MR. WRIGHT: I will offer this Plaintiff's Exhibit 82 for identification in evidence.

THE COURT: Against which defendant?

MR. WRIGHT: This is offered against the Pennsylvania Railroad.

3572 I don't believe copies have yet been served on them.

THE COURT: All right.

Do you want Mr. Layne to read it?

It may be received over the objection.

(Thereupon Plaintiff's Exhibit No. 82 was received in evidence.)

MR. LAYNE: Plaintiff's Exhibit 82 is on the stationery of the Association of Western Railways, Law Department, 280 Union Station Building, 517 West Adams Street, Joseph H. Hays, Counsel, Amos M. Mathews, James W. Nisbet, Ed White, J. D. Feeney, Jr., Attorneys, Chester K. Smith, Research Engineer, Frank E. Haas, Special Representative, Chicago 6, Illinois.

October 30, 1952

"Mr. Lewin W. Wickes, Jr.,
Assistant General Solicitor,
The Pennsylvania Railroad Company,
1740 Broad Street Station Building,
Philadelphia, Pennsylvania.

"RE: MC-C-1413, The Public Utilities Commission of Ohio v. Riss & Company, Inc.

"Dear Lew:

"Thank you for copy of Riss' answer in the above-entitled proceeding, sent with your letter of the 27th.

I was glad to get the news regarding the attitude of
3573 the Ohio Commission with respect to Riss' temporary authority and think you should go to Columbus as soon as your engagements will permit and have a talk with the other Commissioner. The I.C.C. may or may not take a long time to dispose of the complaint case but on the theory that there may be some delay, especially since it has not as yet been set for hearing, it seems to me advisable to press for early action in the temporary authority proceeding. There appears to be nothing to lose and everything to gain by such a move, and I hope you are successful in getting something underway.

"Very truly yours,

(Signed) James W. Nisbet.

Carbon copies: "Messrs:

" F. J. Steinbrecher,

" F. X. Masterson."

3574 BY MR. WRIGHT:

Q. Mr. Wickes, I will show you these next two documents that have been marked for identification as Plaintiff's Exhibits 83 and 84. They are letters from you to, in the first case, Masterson, Steinbrecher and Nisbet, dated October 31, 1952, and from you to the same gentlemen, plus Mr. Renz, dated December 15, 1952, and I will ask you if you recognize those as letters you wrote on or about those dates?

A. Yes sir, I do.

Q. Now you did go to Columbus, did you? A. Sir?

Q. I say, you did go to Columbus after you received that last letter which was just read?

A. What is the date?

Q. The letter that Mr. Layne read from Mr. Nisbet to you was the letter dated October 30, about this PUC proceeding against Riss & Company. Do you recall that?

A. Yes, sir, I remember now. I didn't remember the date, sir. I believe it was after that that I did go to Columbus.

Q. That you did go to Columbus. And you talked to the Commissioners there about this Ohio proceeding against Riss?

3575 A. Yes sir, I believe I did.

Q. Now then will you read the letter you wrote that was marked in evidence as Exhibit 83?

A. It is October 31, 1952, addressed to -- do you want the whole address, Mr. Wright?

Q. Yes, please.

A. "F. X. Masterson, Esq., Motor Carrier Bureau, 1 Park Avenue, New York;

"Frank J. Steinbrecher, Esq., Santa Fe Railway System, 1211 Railway Exchange, Chicago 4, Illinois;

"James W. Nisbet, Esq., Association of Western Railroads, Union Station Building, Chicago, Illinois.

"Gentlemen:

"I am enclosing to each of you the following documents in PUCO versus Riss, before the I.C.C., MC-C-1413:

"Defendants Motion to Make More Definite and Certain Under Rule 36;

"Memorandum Opposing Defendant's Motion to Make Complaint More Definite and Certain.

"Had a very satisfactory conference in Columbus and hope that we can meet soon to decide on further steps and get some work done they would like to have from us.

3576 "Yours truly,

"Lew."

Q. Is that the conference with the commissioners which you just referred to?

A. I believe it was.

It was not a conference with commissioners when I was in Columbus. I met the commissioner that I had not met in Philadelphia, and in Washington, and I believe one other separately.

Q. I want to call your attention to the date of that prior letter October 30, 1952, from --

A. I don't have it here, sir.

Q. Oh, I am sorry; I have the copy that is marked (handing a document to the witness).

A. Thank you.

MR. SHEA: Your Honor, has plaintiff offered Plaintiff's 83?

MR. WRIGHT: I had meant to offer it. If I hadn't I will offer it now.

MR. SHEA: Did you state against whom?

MR. WRIGHT: Against the Pennsylvania Railroad.

THE COURT: Received.

(The document previously marked for identification as Plaintiff's Exhibit No. 83 was received in evidence, letter from L.W. Wickes, Jr., dated Oct. 31, 1952.)

BY MR. WRIGHT:

Q. Do you have, Mr. Wickes, in front of you the letter from Mr. Nisbet to you dated October 30, 1952?

A. Yes, sir.

Q. And I think that one of my prior questions suggested that that conference in Columbus was after that date.

Actually, when you look at Exhibit 83, you can see that it was before that date. Can't you?

A. It was certainly before --

MR. GATES: In order to clear up some confusion, may I suggest to Mr. Wright that he also look at Plaintiff's Exhibit 79 which was Mr. Wickes' letter?

THE COURT: All right.

MR. GATES: Dated October 27th.

THE WITNESS: The dates on these letters would place the Columbus trip somewhere between the letter of October 27th, Plaintiff's Exhibit 79 to which Mr. Gates refers, and October 30th -- October 31st, 1952, about four days later, in which I state that I had a very satisfactory conference in Columbus.

BY MR. WRIGHT:

3578 Q. My problem as to the date was raised by this statement in Exhibit 82 of Mr. Nisbet's where he said:

> "I was glad to get the news regarding the attitude of the Ohio Commission with respect to Riss' temporary authority."

Now, was that news that had been received as a result of some prior visit to Columbus or as a result of your visit in Washington?

MR. McGLOTHLIN: If your Honor please, it shows on the face of Exhibit 79 that this is the news that Mr. Nisbet is referring to. He is one of the addressees of Exhibit 79 which gives him the news.

THE COURT: Well, doesn't the letter speak for itself?

MR. McGLOTHLIN: I thought so.

MR. WRIGHT: I think it does. I think the letter speaks for itself, your Honor.

THE COURT: Very well.

MR. WRIGHT: The dates were close together and it wasn't clear to me as to the precise date of the Columbus visit.

THE COURT: Very well.

BY MR. WRIGHT:

Q. The last exhibit you have in front of you there, Mr. Wickes, which is that?

3579 A. Number 84, sir.

Q. Could I ask you to read that?

I will ask you to read that now, Mr. Wickes.

MR. GATES: If your Honor please, has this been offered in evidence yet?

THE COURT: I thought it had been offered.

MR. WRIGHT: I believe it has.

THE COURT: I think it has been offered and received.

However, against which defendant do you offer it?

MR. WRIGHT: The Pennsylvania. The other defendants do not have copies of this letter.

THE COURT: Is this a letter from Mr. Wickes to Mr. Steinbrecher; is that it?

MR. GATES: That is it.

MR. WRIGHT: This is a letter from Messrs. Steinbrecher, Masterson, and Renz.

THE COURT: All right.

THE WITNESS: Do you want their address again?

MR. WRIGHT: No, just Mr. Renz' address, which I belive you haven't read before.

THE WITNESS: W. A. Renz, Esq., General Attorney, Lehigh Valley Railroad, New York, New York, in addition to Nisbet, Steinbrecher and Masterson.

3580 "Gentlemen:

"According to our conversation in Washington, I have taken a shot at putting something on paper as a form of petition to revoke temporary authorities. This is very rough,. and I would appreciate it if you gentlemen would give it a good kicking around.

"I am somewhat disturbed about the Commission's power to revoke temporary authorities without hearings. The statutory provisions are not as clear as I had thought, unless, in drafting this, I have missed something. As I understand it, the Commission has consistently taken the position that it has power to

revoke temporary authorities for good cause at any time without hearing. Nevertheless, Sections 210a and 9(b) are not as clear as I remembered on this point.

"As it seems from our conversation in Washington that it will be impossible to collect all of us in Columbus in the near future, we might consider whether it would be advisable merely for a couple of us to get out there as soon as we are satisfied with a form of petition. Let me have your suggestions as soon as possible.

"Very truly yours,

3581 "Lew."

BY MR. WRIGHT:

Q. Now that petition was a petition to be filed by the State of Ohio, was it?

THE COURT: Just a minute.

Mr. Gates.

MR. GATES: Your Honor, might the jury be instructed that W. A. Renz, Esquire, General Attorney for the Lehigh Valley Railroad, is representing a railroad which is not a defendant in this proceeding.

THE COURT: Do you agree to that statement, Mr. Wright?

MR. WRIGHT: That is a correct statement, your Honor.

THE COURT: All right.

THE WITNESS: Your question, sir?

BY MR. WRIGHT:

Q. My question was with reference to the first paragraph, the form of petition to revoke temporary authority that you drafted.

That was a form of petition that you filed by Ohio, was it not?

A. Yes. I think that was the work referred to in the last sentence of the Exhibit 83, where the exhibit refers to some work they would like to have from us. I think that is what they want.

3582 Q. And you referred to that -- did you send that rough draft to

these addresses at that time with the letter?

A. Yes, sir.

Q. Now, the Commission that you are referring to on the second paragraph is, I take it, the Interstate Commerce Commission?

A. That is right, sir.

Q. But the last paragraph which refers to collecting all of us or a couple of us in Columbus referred to --

A. Columbus, Ohio.

Q. -- their meeting there for discussing the matter with the Ohio Public Utilities Commission; is that right?

A. No, I don't see any indication there that the purpose was a meeting with the Commissioners of Ohio.

Q. Well, at least there was no way in which you could meet with any members of the Interstate Commerce Commission by getting together in Columbus, was there?

A. There is no indication here that the meeting was proposed to be with any Commissioners.

Q. Well the Public Utilities Commission of Ohio was in Columbus, Ohio?

A. That is right.

3583 Q. There is no doubt about that, is there? A. No, sir.

Q. Do you recall whether you had such a meeting down there?

A. I am quite sure there was never any meeting down there of the kind you seem to be referring to.

Q. I wasn't -- if you will just answer the question and let me worry about the kind of meeting --

THE COURT: Are you talking about the meeting, did he have a meeting with any members of the Utilities Commission of Ohio, in Columbus?

MR. WRIGHT: This refers -- the last paragraph of this letter, to -- I will read it:

"As it seems from our conversation in Washington" --

these gentlemen that you addressed in the December 15, 1952 letter, Mr. Nisbet, Mr. Steinbrecher, and Mr. Masterson, were all engaged to go with you in the Riss explosives case proceeding, were they not?

A. THE WITNESS: In the Sub 84 and consolidated cases and all the rest of them, yes.

Q. And this "conversation" that you are referring to here is a conversation that you had with them in Washington, is it not?

A. That is right, sir.

Q. Just before you wrote the letter?

3584 A. Yes, sir.

Q. And you say that: "It will be impossible to" -

"As it seems from our conversation in Washington that it will be impossible to collect all of us in Columbus in the near future".

Now by that you were referring, I gather, to yourself, Mr. Nisbet, Mr. Steinbrecher, Mr. Masterson and Mr. Renz; is that right?

A. That is right, and that is all.

Q. And then you go on to say: "we might consider whether it would be advisable merely for a couple of us to get out there as soon as we are satisfied with a form of petition?"

A. That is right.

Q. And what I asked you was whether it was or was not a fact that a couple of you, or any of you, or all of you, did get out there to Columbus for the meeting?

A. I didn't understand your question to be just to get out there to Columbus. I didn't know that we did, however.

* * *

3592 "OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS"

"Plaintiff's Exhibit 72

"These defendants object to this exhibit for all the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 72 A

"These defendants object to this exhibit for all the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 73

"These defendants object to this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 74

"These defendants object to this exhibit for all of the

3593 reasons stated with respect to Plaintiff's Exhibits 49, 50, 66 and 68.

"Plaintiff's Exhibit 79

"These defendants object to this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68 and for the further reason that plaintiff has admitted (answers to Interrogatories 208 (20) and (21), served June 16, 1959, by AWR et al.) that Paul Heaton of the PUCO and Commissioner Moulton of the PUCO were neither co-conspirators nor agents of any defendant in the carrying out of the alleged conspiracy.

"Plaintiff's Exhibit 81

"These defendants object to this exhibit for the following reasons:

"1. For all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 66 and 68.

"2. For the reason that the reference to Baggett is wholly irrelevant to any issue in this case.

"Plaintiff's Exhibit 82

"These defendants object to this exhibit for all of the
3594 reasons stated with respect to Plaintiff's Exhibits 49, 50, 66, 68 and 79, and for the further reason that it is a letter between co-counsel which is incompetent to prove or disprove any issue in this case.

"Plaintiff's Exhibit 83

"These defendants object to this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 66, 68, 79 and 82.

"Plaintiff's Exhibit 84

"These defendants object to this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 66, 68 and 82, and for the further reason that it relates to possible future action discussed between counsel which was in fact not taken.

"Plaintiff's Exhibit 85

"These defendants object to this exhibit for all of the reasons set forth with respect to Plaintiff's Exhibits 66, 68, 79 and 84, and for the further reason that plaintiff has admitted (answer to Interrogatory 208 (88), served June 16, 1959, by AWR, et al.) that John Case, attorney for PUCO, was neither a co-conspirator nor an agent of any defendant in the carrying out of the alleged conspiracy."

* * *

3616 Q. Mr. Wickes, I want to draw your attention to your testimony yesterday which is at Page 3460 of the transcript. You said that you talked to some Pennsylvania Railroad public relations people about this project of having Byoir cover the proceedings in which you were engaged. Do you recall that?

A. Yes, sir.

Q. I don't think you mentioned the name of the man in the Pennsylvania public relations department you talked to. Do you recall who that was?

A. The only one that I know of was Mr. Ralph C. Champlin, Vice-President, in charge of public relations.

Q. Well, he was, in fact, the one you talked to, the man you talked to, was he not?

A. Yes. That's what I meant.

Q. And he was, in addition to that -- Vice President of the Pennsylvania Railroad in charge of public relations -- he was also a member, was he not, of the Eastern Railroad Transportation Committee that Byoir was reporting to about its activities?

A. I have heard since that he was a member of that committee, but I don't know the time in which he served.

3617 Q. Well, as a matter of fact, you made the suggestion to him that Byoir cover these proceedings, and he agreed with you, did he not?

A. I wouldn't express it that way, Mr. Wright. I think he said that he would have it looked into, or would look into it. Whether he agreed with me, I don't know.

Q. Well, he told you that he would get in touch with Byoir and make the arrangements with Byoir for someone to see you, did he not?

A. For someone to see me; yes.

Q. Yes, from Byoir -- that he would get in touch with Byoir for that purpose; is that right?

A. That is right, sir. That does not include your prior conclusion that the purpose of Byoir seeing me was to publish anything. That is what Mr. Strouse came to see me about.

Q. The man who came to see you, as I recall your testimony, was Mr. Stull; is that right?

A. That's right.

Q. And before Mr. Stull came to see you, Mr. Champlin sent you a wire he was coming, didn't he?

A. That's right.

Q. Now, at that first meeting with Stull -- I don't believe you told us who, if anyone else, was present -- do you recall whether anyone else was at that meeting?

3618 A. My recollection is that Mr. K. G. Crowl of the Pennsylvania Railroad Commerce Department -- his name is spelled C-r-o-w-l -- and Mr. F. J. Steinbrecher of the Sante Fe Railroad Law Department were in the room at the time Mr. Stull came in.

* * *

3625 BY MR. WRIGHT:

Q. Were you chairman of any committee of any kind that had anything to do with Riss?

A. Yes.

Q. Just what was that committee?

A. I was chairman of a committee which was appointed, according to testimony yesterday in Chicago, to present the rail testimony in Sub-84 case, and the consolidated cases. And, I was, subsequent to that, sometime late in November or early December, appointed chairman of the so-called Eastern Defense Committee handling those proceedings as they were then in progress, instead of Mr. Masterson.

3626 Those two committees are the only ones I can think of up to this time in December of 1952 on which I had any official position as a committee member.

Q. Who were the other members of what you just referred to as the Eastern Defense Committee?

A. The attorneys handling the explosives application cases -- these would have included, among others, W. A. Renz, F. X. Masterson, and Basil Cole -- B-a-s-i-l, C-o-l-e -- who is in the law department of the Pennsylvania Railroad and was assigned to the case before I was, and, in a sense, any eastern motor carrier lawyer, for railroads, that is, who participated in the course of the hearings. I don't remember others at the moment.

Q. Who were you representing in the hearings you are referring to?

A. In that capacity, on that committee, I was representing the trunk line railroads in the eastern territory.

3627 Q. That includes all of the eastern railroads who are defendants in this case, does it not?

A. Yes.

Q. Now, it is a fact, isn't it, Mr. Wickes, that you approved, or cleared, all of the Byoir releases with respect to any of these proceedings you have mentioned which involved Riss & Company?

A. That was the arrangement, sir. Now, to that extent, it included whatever I saw.

* * *

3636 Q. Mr. Wickes, Massachusetts, and a number of other states which had intervened in the Sub - 84 proceeding, all filed briefs, did they not?

A. Yes.

Q. Before the examiner?

A. Yes, sir.

Q. And did you render any assistance in connection with the preparation of those briefs?

A. I did.

3637 Q. You supplied the Attorney General of Massachusetts with a draft of the brief that was filed, not only on behalf of Massachusetts, but on behalf of a number of other states, did you not?

A. Yes, I did.

Q. And that brief that was filed on behalf of Massachusetts and the other states is the subject matter of this release that you have in front of you, is it not?

A. That's my understanding.

Q. And the release was one which was timed to coincide with the filing of that brief on behalf of Massachusetts and four other states; is that correct?

A. That's what I understood.

Q. Now, you, yourself, were familiar, were you not, with the arrangements which had been made with the various Attorneys General, the legal officers of the states involved, for the actual handling of the releases?

A. In a very general way I was. My connection with that was relatively remote because -- of course, I didn't take responsibility, nor was this release or anything about it attributed to me.

Q. Excuse me, are you through?

A. Not quite. Therefore, the ultimate approval, of course, depended on the man whose name was on it.

Q. You were told, were you not, by Dick Strouse of Byoir how these releases were handled, were you not?

3638 A. In a general way, yes.

Q. Yes. And the way they were handled was this, was it not; that Mr. Renz approached each of these, or rather, telephoned each of these Attorneys General, did he not, to arrange for the preparation of releases in their names?

A. I don't know how he did it, but I believe he did it.

Q. And he also represented to them, did he not, that he had an associate, named Richard Strouse, who would undertake to prepare the releases and go through the mechanics of sending them out for them?

A. They were associated in this endeavor; yes.

Q. And you also know, do you not, that the arrangement Mr. Renz made with them was to have them send their official stationery to Mr. Strouse so that he would then take care of the distribution of the releases; isn't that right?

A. Physically, yes.

* * *

3645 Q. I want to direct your attention again to this sentence, "The PUC charged that Riss' explosives trucks had been involved in 596 violations of Ohio law during the period of two and one-half years."

Now, you do know, don't you, that there was no evidence in that record in the Sub 84 hearing with respect to those violations at all, if they existed?

A. No, I do not.

Q. Well, can you point me to any part of that record in the case that you were involved in where you think there was proof made of any of these violations that are referred to in this sentence: "The PUC charged that Riss' explosives trucks had been involved in 596 violations of Ohio law during the period of two and one-half years"?

A. No, I cannot and I desire an opportunity to explain my answer.

3646 THE COURT: All right. Let him explain his answer.

THE WITNESS: The first question was, Were these the same violations? And I said I didn't know.

Your next question was, Can you point to a place in the record where they are? And my answer is I don't know.

THE COURT: All right. Proceed.

BY MR. WRIGHT:

Q. I will be glad to give you the opportunity, Mr. Wickes -- We have the record in that case here and I will make it available to you and you can take as much time as you want and I would like to see if you can, by examining that record, point to any part of it where there is testimony with respect to these violations which are referred to in this sentence, which is, "The PUC charged that Riss' explosives trucks had been involved in 596 violations of Ohio law during the period of two and one-half years."

A. I will be glad to check the record for you, sir, but I assure you I don't know anything about them at the moment.

Q. You do know, don't you, that this statement I just read to you doesn't happen to be a correct statement of facts?

A. Yes.

3647 Q. You know that.

A. I would like to explain that also.

THE COURT: What was your answer?

THE WITNESS: My answer was yes.

THE COURT: All right.

THE WITNESS: The inclusion of the word "explosives" is erroneous. The sentence is: The PUCO charged that Riss' explosives trucks had been involved in 596 violations of Ohio law. The statement to have been correct should have said: The PUCO charged that Riss' trucks had been involved in 596 violations, because I do not believe that the PUCO charged that all of the Riss trucks had been explosives trucks.

* * *

3660 Q. Now, let's get back to this question of what was said in these releases.

You said, if I understood you, that you, yourself, had nothing to do with this sentence that you admit was in error in the Attorney General's release, about the PUCO charging that Riss' explosives trucks had been involved in 596 violations of the Ohio law?

3661 A. I said that the sentence was in error; and I said, I believe, that I had nothing to do with it, that I can remember.

Q. Now, as a matter of fact, a precisely similar error in a Byoir release, that you were consulted about, was called to your attention by Mr. Stull and Mr. Strouse; was it not?

A. Yes, sir.

Q. That was a release that you did know about and that had been issued after consultation with you about the precise question; wasn't it?

A. Yes.

Q. And when they called the error to your attention, you admitted to them that it was improper to make the statement that is made here, did you not?

A. Yes, that is what I told them.

Q. That was later, however; wasn't it?

A. That is right.

Q. By that time, you had been using this statement in quite a large number of releases; had you not?

A. I remember the specific instance that you mention of a release that was written in Kansas City, and I remember being asked about the number of violations charged, and believing that the number was correct, and of overlooking the erroneous use of the word "explosives" before the word "trucks" written by the same man. And I cannot say, certainly that that was used on any other occasion than these two.

3662 Q. Well, that error in that release was made prior to this one; wasn't it?

A. I was taking your lead. You just said later, and I thought it was later.

Q. Well, the fact is, the release in Kansas City you were talking about had to do with the cease and desist order in the so-called Sub-60 TA case; isn't that right?

A. It had to do with the argument which I made and Mr. Layne made before the three-judge court in Kansas City on that case.

Q. That was on the review of that order?

A. That is right.

Q. You don't remember when that was?

A. No, I don't remember specifically. I can try to track it down.

Q. Well, in any event --

A. That was, I believe, in November 1952; and this document that I have before me is dated August 19 or August 20; but since it relates to the briefs, that would have been August 1952 and, therefore, this statement preceded the statement in the Kansas City release.

3663 Q. Let's see if I can find something that will refresh your recollection.

The release that you are referring to, in any event, occurred with respect to the Sub-60 TA case, and was made at the time that you were arguing Riss' appeal from the cease and desist order in the Kansas City court; is that right?

A. That is correct, sir.

* * *

3669 BY MR. WRIGHT:

Q. After you wrote that letter, what, if anything, did you do about correcting the error that had occurred in these prior releases that had been sent out?

A. Nothing about the prior releases.

Q. Now, it is perfectly clear to you now, isn't it, Mr. Wickes, that this paragraph that contained that sentence in the Massachusetts Attorney General's release wasn't put there by the Massachusetts Attorney General?

A. It was not put on the paper by the Massachusetts Attorney General; I am quite sure of that, Mr. Wright; and you know it, too.

Q. It certainly wasn't put in the release by the Massachusetts Attorney General; was it?

A. My understanding was he approved a release in the form in which it stands.

Q. Now, will you answer the question?

A. I think I have.

Q. Well, it is a fact that that was put into the release by Carl Byoir; isn't that right?

A. It was put into a draft of the release by Carl Byoir, as I explained earlier.

3670 Q. Which was submitted to the Attorney General?

A. For his approval.

Q. And what was submitted by Carl Byoir had that paragraph in it?

A. I believe that is right, sir.

* * *

3679 (The objections of Defendants 11 and 29 are as follows:)

"Defendants 11 and 29 object to the admission into evidence of each of the following exhibits on the grounds that:

"1. The authenticity of the exhibit has not been established.

"2. The facts that the document is offered to prove are irrelevant to any issue in the case relating to either of these defendants.

"3. That the document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

"4. The document is not a declaration in furtherance of any conspiracy.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following: 86, 87, 88, 88-A, 89, 90, 91, 92, 93, 94, 95-102, and 103.

"Objections to the following documents are also made on the grounds that each is privileged as attorney's work
3680 product, and discussions between attorneys: 86"

(The objections of Defendant 66 are as follows:)

"Defendant 66 objects to the admission into evidence of each of the following exhibits on the grounds that:

"1. The authenticity of the exhibit has not been established.

"2. The facts that the document is offered to prove are irrelevant to any issue in the case relating to this defendant.

"3. That the document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

"4. The document is not a declaration in furtherance of any conspiracy.

"Plaintiff's exhibits to which the foregoing objections are made by this defendant are the following: 86, 87, 88, 88-A, 89-103.

"Objection is also made to Exhibit 86 as work product of attorneys."

(The objections of Defendants The Association of Western Railways and the individual Western Railroad defendants are as follows:)

3681 "Plaintiff's Exhibit 90

"(Document No. 34)

"These defendants object to the admission of this exhibit for all the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 91

"(Document No. 35)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 92

"(Document No. 36)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 93

"(Document No. 38)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 94

"(Document No. 39)

"These defendants object to the admission of this
3682 exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 95

"(Document No. 40)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 96

"(Document No. 41)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 97

"(Document No. 45)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 98

"(Document No. 46)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

3683 "Plaintiff's Exhibit 99

"(Document No. 47)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 100

"(Document No. 50)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 101

"(Document No. 43)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 102

"(Document No. 48)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68, and for the following additional reasons:

"1. For the reason that plaintiff has admitted (answer
3684 to Interrogatory 202 (25), served June 16, 1959, by defendants AWR, et al.) that Commissioner Haddon of the Indiana Highway Commission and Senator George Manning of New York were neither co-conspirators nor agents of the defendants in carrying out the ends of the alleged conspiracy.

"Plaintiff's Exhibit 103

"(Document No. 56)

"These defendants object to the admission of this exhibit on all of the grounds set forth with respect to Plaintiff's Exhibits 49, 50, 66 and 68."

(Plaintiff's Exhibit No. 103
previously received in evidence.)

* * *

3688 MR. McGLOTHLIN: Your Honor, this may be a good time for me to just state briefly for the record the hearsay objection to this document, which I made to others.

THE COURT: You may.

MR. McGLOTHLIN: This is a document that was circulated within the Byoir organization, which was never seen by the Pennsylvania Railroad.

That is the basis for my hearsay objection with respect to this particular document.

THE COURT: All right.

MR. PIERPOINT: I have a particular objection to this particular document with respect to the purposes for which it was offered.

3689 THE COURT: You may state it.

MR. PIERPOINT: It wasn't really circulated within the Byoir organization. It was a document sent by an account executive, attempting to get a $25.00 award for one of his staffers.

THE COURT: Very well.

MR. PIERPOINT: I submit, your Honor, it is objectionable on that ground.

THE COURT: I overrule your objection.

* * *

3690 Q. . Mr. Wickes, you were fully informed about this particular public relations stunt which you have just heard described in that memorandum; were you not? A. No.

Q. Never discussed it with Mr. Strouse? A. Yes.

Q. You did discuss it? A. Yes.

Q. And you were the one who, of course, advised Strouse about the imminent filing of the brief that you had drafted; weren't you?

A. I don't know.

* * *

3705 BY MR. WRIGHT:

Q. Just what did you do? What did you have to do with that document you have in your hand there, Exhibit 61, if anything?

A. I approved the general form of the statement, without the numbers, and without specific names, with the understanding that the records of the Interstate Commerce Commission, or copies from the Interstate Commerce Commission records, would be checked under the supervision of Mr. Masterson or someone in his office, that the numbers would be filled in from these records, and I knew that this was being done and approved of it.

Q. And you knew, did you not, that that was a public relations gimmick that Strouse had thought up; isn't that right?

A. That is right.

Q. And the gimmick was, wasn't it, that this game of counting trucks that you were playing had no relations at all to the amount of explosives traffic that was going to move through that New York or any other city?

3706 A. It had a relation.

Q. Well, didn't you know, Mr. Wickes, that the amount of that traffic that would move would depend entirely in the first place on how much and where the Defense Department chose to ship it by truck; isn't that so?

A. The Defense Department ships explosives, yes.

Q. Well, what you were talking about there was nothing but Defense Department shipments, wasn't it? A. No.

Q. So that how much actually moved and was shipped wouldn't depend on how many trucks or trailers any or all of these people owned, would it?

A. No. It might be a great deal more than would be indicated by these numbers.

Q. And it might be a great deal less?

A. It might be a great deal less.

* * *

3710 BY MR. WRIGHT:

Q. Well, the mere fact that any of those people were granted authority to haul explosives didn't mean, did it, in and of itself that any of them would ever haul one pound of explosives?

A. May I hear the question, please?

Q. In order to haul explosives through any town, Government military explosives for the Defense Department, you have to have more than just authority from the Interstate Commerce Commission to perform the service, don't you? A. Yes, sir.

3711 Q. You have to be selected by the Defense Department to make a particular shipment they are interested in making by truck; isn't that so?

A. It depends on your rates.

Q. Well, regardless of rates, it also depends on what kind of service you can give too, doesn't it? A. I assume it does.

Q. Well, most of those people you had listed there had never hauled explosives for the Defense Department through New York City or through any other town, had they?

A. Riss had done; Hughes had done.

Q. Now, just pay attention to the question. The question was directed to most of those that you had on the release.

A. C. L. Whitten had. And as to those I know, as to the rest, I do not.

Q. Well, that is four you named out of how many you have on there? A. Nine.

Q. Now, as far as you know five out of the nine were not explosives haulers at all as of that time, Government explosives haulers?

A. I don't know whether they were nor not.

Q. You didn't suggest that anybody take the trouble to find out?

A. I didn't think it material.

* * *

3742 (Whereupon, Objections of Defendants The Association of Western Railways and the Individual Western Railroad Defendants to Plaintiff's Exhibits are as follows:)

"Plaintiff's Exhibit 80. .

"These defendants object to this document for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 66, 68 and 75.

"Plaintiff's Exhibit 86 (Document 60-2)

"These defendants object to this exhibit as hearsay, as wholly immaterial and irrelevant, as incompetent to prove or disprove any issue in this case, and for the following specific reasons:

3743 "1. For the reasons that the reference to Baggett and to Interstate Commerce Commission proceedings relating to Baggett is wholly irrelevant to any issue in this case.

"2. For the reason that the document is replete with incompetent conclusions and opinions of the author as to the nature of evidence and the positions and action to be taken in the course of litigation and of preparation for such litigation.

"3. For the reason that it is a letter between co-counsel in the preparation of litigation for trial, represents the work product of counsel, is privileged, cannot be the basis of jury inferences of any kind, and is incompetent to prove or disprove any issue in this case.

"4. For the reason that joint action in preparation of litigation is lawful and does not evidence either the existence of the alleged conspiracy or the membership of non-membership of any defendant in the alleged conspiracy.

"5. For the reason that the document relates to the taking of future action which is not shown to have been taken.

3744 "6. For the reason that joint participation in ICC proceedings is within the protection of the First Amendment."

"Plaintiff's Exhibit 87.

"These defendants object to this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68, and for the further reason that plaintiff has admitted (answer to Interrogatory No. 208 (112), served June 16, 1959, by defendants AWR et al.) that the Attorney General, State of Massachusetts, was neither a co-conspirator, nor an agent of any of the defendants in the carrying out of the alleged conspiracy."

"Plaintiff's Exhibit 88 (Document No. 37)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to plaintiff's exhibits 66, 68, and 87."

"Plaintiff's Exhibit 88 A (Document No. 44)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66, 68 and 87."

"Plaintiff's Exhibit 89.

"These defendants object to this exhibit on all of the grounds set forth with respect to Plaintiff's Exhibits 49, 50 and 66, and on the further ground that inadvertent

3745 errors of fact do not deprive publicity of the protection of the First Amendment."

* * *

3758 (Thereupon, Objections of Defendants The Association of Western Railways and the Individual Western Railroad Defendants to Plaintiff's Exhibits are as follows:)

"Plaintiff's Exhibit 90

"(Document No. 34)

"These defendants object to the admission of this exhibit for all the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 91

"(Document No. 35)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

3759 "Plaintiff's Exhibit PX 92

"(Document No. 36)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 93

"(Document No. 38)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 94

"Document No. 39)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 95

"(Document No. 40)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 96

"(Document No. 41)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

3760 "Plaintiff's Exhibit 97

"(Document No. 45)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 98

"(Document No. 46)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's exhibits 66 and 68.

"Plaintiff's Exhibit 99

"(Document No. 47)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 100

"(Document No. 50)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 101

"(Document No. 43)

"These defendants object to the admission of this

3761 exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68.

"Plaintiff's Exhibit 102

"(Document No. 48)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 66 and 68, and for the following additional reasons:

"1. For the reason that plaintiff has admitted (answer to Interrogatory 202 (25), served June 16, 1959, by defendants AWR, et al.) that the Indiana Highway Department was neither a co-conspirator nor the agent of any defendant in carrying out the ends of the alleged conspiracy.

"2. For the reason that plaintiff has admitted (answers to Interrogatories 208 (91) and (106), served June 16, 1959, by defendants AWR, et al.) that Commissioner Haddon of the Indiana Highway Commission and Senator George Manning of New York were neither co-conspirators nor agents of the defendants in carrying out the ends of the alleged conspiracy.

"Plaintiff's Exhibit 103

"(Document No. 56)

"These defendants object to the admission of this
3762 exhibit on all of the grounds set forth with respect to Plaintiff's Exhibits 49, 50, 66 and 68."

* * *

3765 (Thereupon, Mr. Ball filed the following objection of Defendants the Association of Western Railways and the Individual Western Railroad Defendants:)

"Plaintiff's Exhibit 104

3766 "(Wickes No. 3)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68."

MR. McGLOTHLIN: I just want to know whether the attachment is offered as proof of the matter asserted.

MR. WRIGHT: The letter and the attachments, they are all in together.

MR. McGLOTHLIN: I understand that, but I want to know whether the attachment is offered for proof of the matter asserted.

MR. WRIGHT: The attachment is offered as evidenceof the false and misleading propoganda that the Pennsylvania Railroad and Byoir circulated.

THE COURT: That would be a question for the jury.

MR. McGLOTHLIN: Your Honor, may I have an answer to my question? I asked whether it was offered for proof of the matter asserted. It is or it isn't.

THE COURT: Let us hear from Mr. Wright.

MR. WRIGHT: The same statements in this article are alleged by us to be false. That was singled out as false in the Ties article. As soon as this is in evidence and read it will become apparent that it is taken word for word in large part from the Ties article.

THE COURT: All right, he stated the reason for his offer.

3767 MR. McGLOTHLIN: I understand that he stated the reasons for his offer, but I just wanted to know if this is offered for proof of the matter asserted.

He can answer, yes, or no.

MR. WRIGHT: The answer with respect to the letter is, yes, the truth --

MR. McGLOTHLIN: What is the answer with respect to the attachment?

MR. WRIGHT; The letter is offered to show that Mr. Wickes wrote this letter to Mr. Beman on that date and enclosed this article.

The article, I repeat, is contended by us to be a false article.

THE COURT: Well, that is the purpose for which you are offering it?

MR. WRIGHT: Yes, sir.

THE COURT: To show it is a false article. All right. Now you have his answer on that.

MR. McGLOTHLIN: I suppose the answer is yes.

THE COURT: Mr. Pierpoint, do you have any objection?

MR. PIERPOINT: Yes, I will object to the statement of counsel that this is a piece of propaganda which was disseminated by the Pennsylvania Railroad and Byoir. There is no proof of that and there is not going to be any proof of that, and I object to the statement.

3768 THE COURT: All right, you may proceed. I will overrule the objection.

MR. BALL: Our objection is noted?

THE COURT: Yes.

* * *

3785A "Defendant 66 objects to the admission into evidence of each of the following exhibits on the grounds that:

1. The authenticity of the exhibit has not been established.

2. The facts that the document is offered to prove is irrelevant to any issue in the case relating to this defendant.

3. That the document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

4. The document is not a declaration in furtherance of any conspiracy.

Plaintiff's exhibits to which the foregoing objections are made by this defendant are the following:

Plaintiff's Exhibits 104 and attachment.

* * *

3963 "Defendants 11 and 29 object to the admission into evidence of each of the following exhibits on the grounds that:

1. The authenticity of the exhibit has not been established.

2. The facts that the document is offered to prove is irrelevant to any issue in the case relating to either of these defendants.

3. That the document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

4. The document is not a declaration in furtherance of any conspiracy.

Plaintiff's exhibit to which the foregoing objections are made by these defendants are the following" -- No. Plaintiff's Exhibit 108.

3694 "Objections of Defendants the Association of Western Railways and the Individual Western Railroad Defendants --

"Plaintiff's Exhibit 108

("Wickes No. 57)

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68, and for the further reason that this document relates to legislative activities within the guarantees and protection of the First Amendment."

* * *

3982 (Thereupon, Mr. Ball filed Objections of Defendants The Association of Western Railways and the individual Western Railroad defendants, to Plaintiff's Exhibit 109, as follows:)

"Plaintiff's Exhibit 109

"(Wickes No. 4)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68."

* * *

3987 (Thereupon, Mr. Ball filed Objections of Defendants the Association of Western Railways and the individual Western Railroad defendants, to Plaintiff's Exhibit No. 110, as follows:)

"Plaintiff's Exhibit 110

"(Wickes No. 5)

"These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68."

* * *

3988 (Mr. Ball filed Objections of Defendants the Association of Western Railways and the individual Western Railroad defendants, to Plaintiff's Exhibit No. 111, as follows:)

"Plaintiff's Exhibit 111

"(Wickes No. 7)

3989 "These defendants object to the admission of this exhibit for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68."

* * *

3994

"OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS, Plaintiff's Exhibit 112 (Wickes No. 65).

"Defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 40, 41, 41-A, 42, 43 and 43-A."

* * *

3998 Q. I will show you this document that has been marked for identification as Plaintiff's Exhibit 113, Mr. Wickes and ask you to look

and see if that -- see if you can tell from examination whether you have there the clip sheets that were sent out by you?

A. (Witness examined the exhibit.) I believe they are.

MR. WRIGHT: I will offer that exhibit that has just been identified in evidence against the --

THE COURT: Is there any objection?

MR. PIERPOINT: May I see the note? I haven't seen it.

THE COURT: Yes.

MR. BALL: Against whom, Your Honor?

3999 THE COURT: Against which defendants?

MR. WRIGHT: Against Byoir and the Pennsylvania Railroad and the defendants who were just identified as those to whom the letter of March 20 was sent with the clips.

THE COURT: That is those persons mentioned in Plaintiff's Exhibit 112, which were people to whom these clips were sent.

MR. WRIGHT: Yes.

THE COURT: And this is being offered against those companies and persons --

MR. WRIGHT: Plus the AAR.

THE COURT: And Byoir.

MR. WRIGHT: Byoir, the AAR, and those railroad defendants.

MR. BALL: We note the same objections as noted to 111, 112, and --

THE COURT: Yes. Objection overruled. It may be admitted.

* * *

4005 "OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS, Plaintiff's Exhibit 114, (Wickes NO. 123).

"These defendants object to the admission of this

4006 document for all of the reasons stated with respect to Plaintiff's Exhibits 40, 41, 41-A, 42, 43, 43-A, 49, 50, 51, 66 and 68."

"OBJECTIONS OF DEFENDANTS 11 and 29.

"Defendants 11 and 29 object to the admission into evidence of each of the following exhibits on the grounds that:

"1. The authenticity of the exhibit has not been established.

"2. The facts that the document is offered to prove is irrelevant to any issue in the case relating to either of these defendants.

"3. That the document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

"4. The document is not a declaration in furtherance of any conspiracy.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following: Plaintiff's Exhibits 109, 110, 111, 112, 113, 114.

"Plaintiff's Exhibit 114: Defendant 11 objects on the further ground that the author of this letter had no authority
4007 to make the statement contained in the last paragraph thereof."

* * *

4031 The principal function of a Judge, and obligation, as I said yesterday, is to see that both sides get a fair trial. In the Court's opinion, that cannot be done unless we have a patient jury and a patient Judge and skilled and patient lawyers, which we have.

We have here, and I am not saying this by way of flattery, we have here a great many of the outstanding lawyers in the country in this courtroom at the present time, and have been since the beginning of this trial, and they sit on both sides of the fence here, the defense and the plaintiff. They are skilled, they know this anti-trust law, and they are trying to develop the facts for your consideration.

* * *

4039 "OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

Plaintiff's Exhibit 115

(Wickes No. 78)

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 40, 41, 41-A, 42, 43 and 43-A."

- - - -

"OBJECTIONS OF DEFENDANTS 11 and 29 TO PLAINTIFF'S EXHIBITS 115, 116, 116-A

"Defendants 11 and 29 object to the admission into evidence of each of the following exhibits on the grounds that:

1. The authenticity of the exhibit has not been established.

2. The facts that the document is offered to prove are irrelevant to any issue in the case relating to either of these defendants.

3. That the document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

4. The document is not a declaration in furtherance of any conspiracy.

* * *

4048 MR. GATES: Excuse me, Your Honor. Both Exhibits 115 and 116 and 116-A came from the files of the T.E,A.

These were documents which we asserted were attorney-client privilege.

MR. BALL: The West will join in that.

MR. GATES: From Mr. Wickes, it appears from his testimony here, that he represented a great many railroads.

Masterson, an employee of the T.E.A., also appeared, not representing the T.E.A. but representing individual railroads.

Now, we believe these documents are privileged and should not be introduced in evidence in this proceeding.

THE COURT; What did I rule on the question of privilege?

MR. GATES: You ruled initially adversely to us, but without prejudice to our raising it at the time because you did not have before you at that time, the testimony of Mr. Wickes, in which he says " I was chairman of this committee.

4049 If you look at the last paragraph of Exhibit 15 --

THE COURT: Let me read it again.

MR. BALL: The West joins in this claim, not having had an opportunity to make that before.

THE COURT: Let me read them.

Now, your objection --

MR.. GATES: You have to read this first. He is complimenting Masterson on the preparation he did in the brief.

THE COURT: Let me read 116.

All right, I have read them.

MR. GATES: You see, this here to Francis X. Masterson makes reference to a meeting of counsel in this case to discuss --

THE COURT: I understand. I am going to adhere to my original ruling.

All right, overruled.

MR. GATES: This is with respect to both Exhibit 115, 116 and 116-A.

THE COURT: That is correct.

* * *

4073 MR. WRIGHT: The document that will be given the next Plaintiff's Exhibit number is a letter from Lewin W. Wickes, Jr., to J. H. Hays, dated April 16, 1953.

(The document was marked Plaintiff's Exhibit No. 118 for identification, letter from Wickes to Hays, dated April 16, 1953.)

(Thereupon Mr. Ball filed objections to Plaintiff's Exhibit 118, as follows:

"Objections of defendants the Association of Western Railways and the individual Western Railroad defendants.

4074 "Plaintiff's Exhibit 118.

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 40, 41, 43, 43A, 66, 68, 81, 82, and 86."

MR. WRIGHT: Also I think you will find that this document is a part of the one that was labeled Document 63 in the prima facie case.

Now, I will ask to have marked with the next Plaintiff's number a press release.

MR. SHEA: May we have the number of the last one?

THE DEPUTY CLERK: No. 118

MR. SHEA: That is the letter of April 16th?

THE DEPUTY CLERK: Yes, sir.

MR. WRIGHT: No. 119 will be a press release from Lewin W. Wickes, Jr., Chairman of Traffic and Law Committee, June 4, 1953.

(The document was marked Plaintiff's Exhibit No. 119 for identification, press release from Wickes, dated June 4, 1953.)

(Thereupon Mr. Ball filed objections to Plaintiff's Exhibit 119, as follows:)

"Objections of Defendants the Association of Western Railways and the individual Western Railroad Defendants.

4075 "Plaintiff's Exhibit 119

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68."

* * *

4076 MR. WRIGHT: 120 is a two-page release from Lewin W. Wickes, Jr., Dated July 23, 1953, headed Civic Opposition to Explosives Trucking Joined by Railroads.

MR. AILES: What is the date again?

MR. WRIGHT: July 23, 1953.

(The document was marked Plaintiff's Exhibit 120 for identification, two-page release from Wickes, dated July 23, 1953).

(Thereupon Mr. Ball filed objections to Plaintiff's Exhibit 120 as follows:)

"Objections of Defendants the Association of Western Railways and the individual Western Railroad Defendants.

"Plaintiff's Exhibits 120 and 121.

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68."

* * *

4082 (The document was marked Plaintiff's Exhibit 123 for identification, Inter-Office Communication, Carl Byoir and Associates, dated August 18, 1953)

(Mr. Ball filed objection to Plaintiff's Exhibit 123 as follows:)

"Objections of Defendants the Association of Western Railways and the individual Western Railroad Defendants.

"Plaintiff's Exhibit 123

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68."

(Defendants 11 and 29 filed objections as follows:)

"Defendants 11 and 29 object to the admission into evidence of each of the following exhibits on the grounds that:

"1. The authenticity of the exhibit has not been established;

"2. The facts that the document is offered to prove is irrelevant to any issue in the case relating to either of these defendants;

"3. That the document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay;

4083 "4. The document is not a declaration in furtherance of any conspiracy;

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

"Plaintiff's Exhibits 117, 118, 119, 120, 121, 122, and 123."

* * *

4127 BY MR. WRIGHT:

Q. Mr. Wickes, did you ever get an answer to your inquiry as to what the actual broadcast distribution was of this broadcast that Mr. Layne read?

A. I don't know, sir.

Q. You don't recall? Do you recall what the extent of the actual distribution was, yourself? A. No, sir.

Q. Now, I want to call your attention to the sentence on page 4 that states:

> "And this year ten state legislatures considered bills limiting the amount of explosives that could be moved via highway." Do you see that, sir?

A. Yes, sir, I see it.

Q. Do you know what kind of bills that sentence had reference to?

A. No, I didn't write this, Mr. Wright. I can certainly guess, but I do not know.

Q. Well, you, yourself, had had some connection, had you not, with the drafting of bills limiting the amount of explosives that could be moved via highway?

4128 A. With the drafting of one such document, I did.

Q. And when was that?

A. I don't remember.

Q. Do you recall that that was during the hearings in the Sub-84 proceedings, before the hearings closed?

A. Oh, I am sure of this much. I am quite sure it was after that.

Q. Do you recall you were examined on this subject at the time your deposition was taken on April 18, 1955?

A. I believe I was.

Q. Do you think you had a somewhat clearer recollection of what was done about it then than you have now?

A. I should have thought I would, that long ago.

Q. Don't you recall that you testified at that time that with respect to a proposal to limit the transportation of explosives by truck to 5,000 pounds?

A. I think -- I think I testified about a draft of a bill to limit trucks of explosives to 5,000 pounds.

MR. WRIGHT: I will ask to have marked with the next Plaintiff's number for identification a document which was identified during Mr. Hardy's deposition as Hardy Exhibit 2. It came from the Byoir files.

4129 THE CLERK: Plaintiff's Exhibit No. 124, for identification.

(Whereupon copy of model law limiting weight on trucking explosives, previously marked Hardy Exhibit 2, was marked Plaintiff's Exhibit No. 124, for identification.)

BY MR. WRIGHT:

Q. I will show you this document, which has been marked Plaintiff's Exhibit 124.

* * *

4131 MR. McGLOTHLIN: May I make an objection at this time, Your Honor, as to this line of questioning?

THE COURT: I haven't heard the question yet.

MR. McGLOTHLIN: The line of questioning is obviously addressed to the alleged submission to state legislatures of proposed bills which would have an effect upon the transportation of explosives by motor carrier.

That, I presume, is being urged as in some way offensive to the antitrust laws, and in some way creating liability on behalf of whatever defendant the plaintiff may indicate had a part in those bills.

4132 I object to that line of testimony, both to the questions and the exhibits on the ground that under the Constitution, every American citizen has a right to present to the legislature bills for its consideration, that his motive in doing so is entirely irrelevant because the right to be protected by the Constitution is the right of free approach to the legislatures both of the states and of the United States.

THE COURT: Have you finished now?

MR. McGLOTHLIN: Yes.

THE COURT: Does anybody else want to make a statement? You adopt the same?

MR. AILES: Yes.

MR. BALL: That is right.

THE COURT: I think I have already indicated this before, and I am sure I have said this at least once in the presence of the Jury, and I have said it to counsel out of the presence of the Jury.

That the First Amendment, of course, provides, in effect that a person may petition the legislature or the Congress.

Now, however, the Court has ruled that if the evidence showed -- and the question of whether or not the evidence develops this is for the Jury to determine -- that these so-called 5,000 pound bills were introduced into the various legislatures in the country, and I think there were about ten or eleven, or something like that --

4133 MR. WRIGHT: The statement here refers to ten state legislatures.

THE COURT: Now the Jury will be instructed and instructed at quite a bit of length on this in the final instruction. But if the Jury should find from all the evidence that the purpose in doing this, that is, that if the defendants, one or two or more, conspired to violate the antitrust laws -- that is, they had an unlawful purpose in mind -- even though they did acts which, by themselves, might be lawful acts, but if they performed those lawful acts pursuant to an unlawful conspiracy to violate the antitrust laws, then the Court's ruling will be and has been that if the Jury finds that from the evidence in the case, they would not be immunized under the First Amendment to the Constitution.

I think I have stated that before.

MR. BALL: Defendants must note their disagreement with the instruction of the court.

THE COURT: I understand.

MR. BALL: First, on the ground that the implication of the Court is the Constitution covers only the petition of a single individual.

THE COURT: No, I don't mean it that way. Of course, it doesn't.

4134 MR. BALL: It covers --

THE COURT: Covers a corporation or anybody.

MR. BALL: Secondly, we believe that is a joint petition to the legislature.

THE COURT: Of course, you gentlemen know that I am following the Noerr case; and I refer you to Judge Clary's decision. I am talking about that, particularly on that point.

Let's proceed.

BY MR. WRIGHT:

Q. Mr. Wickes, have you had a chance to look at that document in front of you?

A. I have scanned it, sir.

Q. Are you able to recognize that as the draft of a 5,000 pound bill that you were examined about when your deposition was taken in this case? A. No, sir.

MR. WRIGHT: Have you a copy of the deposition?

MR. McGLOTHLIN: Yes, I have.

* * *

4135 Q. I want to call your attention, particularly, Mr. Wickes, to the questions and answers at the top of Page 236 there. Have you got to those. A. Yes, sir.

Q. You were asked:

4136 "Well, now, is this exhibit 2 for identification in substance a copy of the law as proposed by you to Mr. Hayes that you referred to in your prior testimony?"

It was clear to you then that you were being asked about that document that has been identified as Hardy Exhibit 2 in Hardy's deposition; was it not?

A. That was the question in my mind, Mr. Wright. If this is Hardy's Exhibit 2, my answer in 1955 was at some slight variance with my present recollection.

Q. Well, is there anything about that document you have in front of you that suggests it is somehow different in any way from what was shown you as Hardy Exhibit 2 at the time of your deposition?

A. Yes, there is, from merely reading what I said at Pages 235 and 236 of my deposition.

When I read this document, which is marked Plaintiff's Exhibit 124, here a moment or two ago, I was convinced that the

material on Pages 2 and 3 was unfamiliar to me.

I believe that the -- I believed that the substance of the bill that I had something to do with drafting -- not a bill, a draft of possible legislation -- is contained almost entirely in Sections 1 and 2 of this document, which occur both on Page 1.

4137 Q. Let's see if you are looking at the same thing I am looking at.

Now, is it your present testimony, Mr. Wickes, that when you were shown Hardy's Exhibit 2, for identification, and examined about it when your deposition was taken, that Pages 2 and 3 were not attached to that document?

A. No, that isn't my contention. I would read my prior testimony at the moment as though I had looked at the first page and not the ensuing two pages.

This isn't a quibble. It is simply a complete conflict in what I saw when I looked at Plaintiff's Exhibit 124 on the witness stand today as against what I read my testimony to say in 1955.

Q. Let me call your attention, Mr. Wickes, to the first question on Page 235. Weren't you asked this question by me, Mr. Wickes:

> "At the close of the hearing yesterday, Mr. Wickes, you were asked some questions about a model law to put a weight limitation on the trucking of explosives, and I want to show you now this three-page document that was marked for identification as Hardy Exhibit 2 during Mr. Hardy's deposition and ask you if you recognize that as a copy of the model law you were talking about yesterday."

4138 You answered, did you not?

"Yes, sir, I believe that's what it is."

Do you recall that?

A. That is right. That is what I answered.

Q. Do you want to change that testimony now? Do you think you were mistaken then?

A. I don't know that this is Hardy's Exhibit 2 that I have before me. This has no indication on it as to Hardy, or anything else. It simply says, Plaintiff's Exhibit 124; and that is the only identifying number on it.

If this document was handed to me in 1955, and if I was testifying on Page 235 about this same document, my present opinion is that as to the first page, my answer would have been correct, and as to the last two pages, I have some difficulty -- I don't remember having anything to do with drafting or even reading these particular limitations in Section 3 and Section 4.

Q. You don't have any doubt from the question I read you, do you, that you were then shown and examined about a three-page document?

4139 A. No, no doubt at all. I think I would have noticed if I had been handed one page and was asked about three.

Q. Well now, then you were asked this question with respect to that document, at the top of Page 236:

"Well, now, is this Exhibit 2, for identification, in substance a copy of the law as proposed by you to Mr. Hayes that you referred to in your prior testimony?"

You answered, did you not?:

"It is the kind of law that grew out of discussions such as I have described earlier."

Was that testimony correct?

A. I believe it is. I think that the provisions of the draft which I remember -- naturally, the railroad has no power to introduce a bill anyway; those are introduced by members of the legislature.

I think that what I meant-- if you want me to construe my testimony on Page 236 -- was that the first two sections, which provide substantially that truck transportation of explosives shall be limited to 5,000 pounds per load, is the substance of the legislation with which I had any connection, the suggested legislation.

I say on 236:

"It is the kind of law that grew out of discussions such as I have described earlier."

Now, this, in other words, Mr. Wright -- I am trying to answer your question -- seems to relate to the kind of thing that I thought of as suggested legislation, and the stuff that was attached to it, and appended to it by later draftsmen or by people who may actually have introduced such a bill is simply something that I don't remember. I don't believe that I had seen it even in 1955.

4140 Q. Mr. Wickes, I am not asking you to construe your testimony. I just want to know whether you were asked these questions and gave these answers.

Now, if you will continue to look at 236, and look at the next question, it was this, wasn't it: :

"Well, can you tell me what, if any, differences there are between the provisions that are set forth in this exhibit, Hardy 2, here, and the model law that Mr. Hayes sent to you after -- or that grew out of your discussions with him?"

And you answered:

"Oh, I don't think there are any material differences. Not that I have seen on a quick check of it."

Do you wish to change that testimony?

A. Mr. Wright, I am assuming that we are talking about the same document. I don't even know that. On a quick check of this particular document, I picked up what I thought were material differences.

4141 Q. Do you think you have now discovered some material differences that were not apparent to you at the time you examined it in 1955; is that correct?

MR. SHEA: If the Court please, the witness has testified, and I object on that ground --

THE COURT: I can't hear you.

MR. SHEA: The witness has testified that he isn't sure whether this is the one or not. Mr. Wright's question is loaded. It implies that the witness has already testified to something he hasn't testified.

This is not fair examination. I think it is perfectly clear, for instance, in the memorandum I submitted to Your Honor, that it is objectionable examination and it isn't fair to the witness.

It suggests to the jury facts that are not established by the testimony of someone under oath and subject to cross examination, i. e., that Mr. Wright is attempting to put this into the mind of the jury on his own statement rather than by --

THE COURT: Mr. Wright, let me ask you what you are trying to develop, then, from this witness, as to this document, the 5,000 pound bill?

MR. WRIGHT: What I want to clear up is this suggestion he keeps making repeatedly that he is not being examined now on the document he was being examined upon then.

4142 If Mr. McGlothlin, his counsel, makes any claim this document that was handed to him is not a true and correct copy of the document that was identified as Exhibit 2 at Mr. Hardy's deposition and about which he was examined by me in 1955, I want to know that right now.

* * *

4144 MR. SHEA: I say Mr. Wright says this is a copy of what was attached to the deposition. As far as my client is concerned, I take his word for it.

My suggestion is a different one. My objection is a different one.

May I say this, that I don't want to be up on my feet all the time. I think Mr. Wright is constantly doing this kind of thing, constantly trying to put into the jury's mind on the basis of his statement, rather than properly adduced testimony, his theory of the case, ip effect.

And I think it is wholly improper and I think Mr. Wright knows it.

Now, I don't want to be repeating this kind of objection constantly but I assume that, I have this objection in respect of this kind of question by Mr. Wright, whenever he puts it, without having to constantly interrupt.

THE COURT: Well, do you wish to make a statement, Mr. Wright?

MR. WRIGHT: Well, what Mr. Shea had to say had absolutely nothing to do with the point I was addressing myself to, and that is that if there is any contention by anybody that that document which the witness is being examined upon was not the one he was examined upon at the time of his deposition, I want to know it right now, without any pussyfooting, "I don't know, I don't think so."

4145 It is a fact which Mr. McGlothlin was bound to know at the time he prepared for this case, and this business of saying "I do not know" is to me quite objectionable.

THE COURT: All right, Mr. McGlothlin.

MR. McGLOTHLIN: If Mr. Wright will state to the Court this is a true copy of Hardy No. 2, I have no quarrel with it whatsoever.

He asked me whether I knew, and I don't know.

If he says so, it is all right with me.

THE COURT: Will you make that statement?

MR. WRIGHT: Of course. I made that representation at the time I had it marked. Mr. McGlothlin knows that.

* * *

4146 Q.. Then you were asked in the next question, Mr. Wickes:

"Question: And can you tell us just what, if anything, you did with copies of that model law or that proposal that you haven't already covered in your prior testimony?"

Do you recall that question?

A. I see it here.

Q. And your answer was, was it not:

"Answer: I am sure that I had copies of it or had copies made, Mr. Wright, and it is entirely likely that on a purely personal basis I gave copies to a number of people that I knew."

Now, is that testimony correct, or isn't it?

A. I believe it to be correct.

Q. Now, you did then have some, or you are satisfied now that you had some prior discussions about that particular bill there, the 5,000 pound bill, with Mr. Joseph Hays?

A. No, sir, I am not.

Q. Well, let me call your attention to the prior testimony you gave on that matter, and let's see if we can find out what, if any, changes you may desire to make in that.

4147 A. Apparently I answered your question in ignorance. When you said that bill, I thought you were talking about Plaintiff's Exhibit 124.

This bill, I am not sure that I ever saw before, under any circumstances, either in 1955 or before that, or after that.

Q. Now, will you turn to page 76 of the afternoon session of your deposition on April 18, 1955?

A. Page 76?

Q. Yes, please.

A. I have it.

Q. Do you recall a question that was asked you there, which was asked by me:

"Question: This morning, Mr. Wickes, I think the last question referred to the conversation you had with the representative of the Sheriffs' Association, and then I would like to know what the next time was that you had any discussion with anyone about this 5,000 pound limitation legislation?"

And then you answered:

"Answer: If my recollection of the sequence of events is correct, it was merely the request that I have spoken of earlier from some Brotherhood representative that we lend him the film."

4148 What did that refer to, do you recall?

Or, first, was that answer which you gave correct?

A. I believe that that was correct.

Q. Now, what was the film that you were referring to there?

A. It was a moving picture film which had been taken and developed for evidence in Sub-84 and the consolidated cases.

Q. Was that the film which had been ordered and paid for by the Pennsylvania Railroad?

A. It was ordered by an employee of the Pennsylvania Railroad and I believe that it was paid for by the Traffic Executives Association.

Q. And that was a film purporting to show Riss explosives trucks violating laws?

MR. McGLOTHLIN: If Your Honor please, the best evidence of that is the film, which is available in Washington, if Mr. Wright wants it.

THE COURT: Well, I think he is cross examining him as to his knowledge of that film.

MR. WRIGHT: I think he knows what the substance of the film was.

4149 THE COURT: All right, I will let you proceed.

THE WITNESS: It was a film that did show violations of law by various truckers of explosives, including Riss.

BY MR. WRIGHT:

Q. Now, insofar as the Riss portion of that film -- as a matter of fact, all of it was rejected as evidence when you offered it in the ICC proceeding, was it not?

MR. BALL: The defendants object to drawing an inference from a ruling on a point of evidence made in another tribunal. The ruling was made under a specific technical rule of evidence by the Commission and carried no implications, and improper here.

THE COURT: Let me ask counsel:

Q. What if that had been approved; what would that mean?

MR. WRIGHT: Next I propose to show that the film was not made for evidentiary purposes but for a propaganda purpose which I am about to develop.

THE COURT: You may ask him that, but I will sustain the objection to the other part.

All right.

MR. WRIGHT: Well, my next question is, after it was rejected in evidence at the hearing, what was done with it?

4150 Now, I am entitled to know that.

THE COURT: Let's go on and find out what was done with it.

BY MR. WRIGHT:

Q. That was the film, was it not, that afterwards at a time when it had been rejected as evidence, you then --

THE COURT: All right, the jury will disregard the statement. I have already ruled that out.

MR. WRIGHT: If the Court please, I think I am entitled to show that what he did was put a sound track on it and then show it to Byoir and use it in connection with some of these 5,000 pound hearings.

THE COURT: You can ask him.

I am not going to permit in evidence what the ruling of the Examiner was, or why it was projected.

MR. WRIGHT: If the Court please, that is already in evidence in the Examiner's report.

THE COURT: Is it already in there?

MR. WRIGHT: It is in the Examiner's report, and it is also referred to in the Commissions' decision in the same case.

THE COURT: Well, I can overlook that.

MR. BALL: The reason given is also in there, which is a technical reason, and our objection is to the inference it is being given by an improper characterization of a ruling.

4151 THE COURT: Well, the jury will draw no inference from the remarks or the statement of Mr. Wright.

Let's proceed.

BY MR. WRIGHT:

Q. You, yourself, had a sound track put on the film, did you not, after the hearing?

A. Yes, sir.

Q. And then, what did you do with the film after you put the sound track on it?

A. I put it away.

Q. You never offered it in any administrative or judicial proceeding as evidence, did you, after you put the sound track on it?

A. No, I don't believe I did.

Q. And you showed it to Byoir, did you not, as a possible device for creating some publicity?

A. I showed it to Byoir, to one or two members of the Byoir organization.

Q. Do you remember who they were?

A. I think Mr. Beman saw it and I think Mr. Strouse saw it, and beyond that I don't know.

Q. And then, later on, you also made that film available, did you not, for use at legislative hearings involving this 5,000 pound bill, did you not?

4152 A. On at least one, and I think two occasions, I was asked for the bill -- I mean, for the film. As I recollect, through several messengers, and it was supposed to be in connection with such a bill. That's right.

Q. Do you recall those were hearings in connection with the hearings on the bill before the Maryland Legislature over here in Annapolis, were they not?

A. That is what I was told.

Q. Now, getting back to the time when you first discussed the bill of that kind, you say you have no recollection of when that was now?

A. My own immediate present recollection was that it was not earlier than 1952, which I understood to be an early question, and I have thought about it. I believe that it was toward the end of 1952, or possibly during the summer.

Q. Now, will you turn to page 65 of your deposition in the morning of April 18th, 1955?

You concede that you were then being questioned about this 5,000 pound legislation, were you not?

A. Yes, there are some questions in there about that.

Q. And you were asked, were you not:

"Question: When was the first time that legislation of that character was brought to your attention?

4153 And you answered:

"Answer: I believe that in conversations among co-counsel on the various cases involving the motor haulage of explosives, counsel conceived that the whole question might be solved better by legislation and that there were conversations about that possibility."

Was that answer correct?

A. Yes, sir.

Q. Now, those co-counsel that you refer to there were whom?

A. I wouldn't be able to select. I also wouldn't eliminate. I don't know specifically.

Q. Don't you know that one of them was Joseph Hays?

A. I said I wouldn't be able to enumerate these people. Probably everybody involved actively in the hearing in Washington.

Q. That would include Joseph Hays, would it not?

A. That's right. I didn't intend to evade that.

Q. And this question, that it might be solved better by legislation, was what?

A. The question involved in the application bid.

Q. Which was the question of whether or not truckers should be permitted to haul ammunition and explosives for the Government in competition with the railroads, was it not?

4154 A. Well, the question turned on their applications and what the ICC might find.

Q. Well, that is what they were for, wasn't it? That is what they were applying for?

A. They were applying for authority to transport explosives.

Q. In competition with the railroads you were representing. Is there any question about that?

A. No, of course not.

Q. Now, you and your co-counsel felt that it might be solved better by legislation such as these 5,000 pound bills; is that correct?

MR. BALL: I object to what co-counsel thought. This is calling for hearsay and opinion.

THE COURT: He mentioned counsel, didn't he?

I will let him proceed.

MR. BALL: He mentioned the conversation.

THE COURT: I will let him proceed.

THE WITNESS: That is what I was thinking, in any event.

BY MR. WRIGHT:

Q. Well, your statement was here, Mr. Wickes -- and I will read it to you again:

4155 "I believe that in conversations among co-counsel on the various cases involving the motor haulage of explosives, counsel conceived that the whole question might be solved better by legislation, and that there were conversations about that possibility."

MR. BALL: If the Court please, we are in this situation, that objections of this kind were not noted at the time the deposition was taken.

We now object to the asking of this question, because it is calling for this witness to give his opinion as to what was in the minds of other people.

THE COURT: Well, suppose they discussed something among themselves?

MR. BALL: The fact that a subject is discussed is a perfectly competent thing but for him to speculate the motives or purposes in the minds of other people is not proper.

THE COURT: If he says he doesn't know -- but he can ask it.

MR. BALL: But I object to the point in the deposition.

THE COURT: All right, overruled.

You may proceed.

4156 BY MR. WRIGHT:

Q. After this was discussed between you and the other co-counsel, isn't it a fact that Mr. Hays and you discussed the bill with someone from the National Sheriffs' Association? A. Yes, sir.

Q. You recall doing that.

And do you know what, if any, action was taken by the National Sheriffs' Association with respect to that bill?

A. I think that the Editor of the trade paper that the Sheriffs have, wrote some of an article about it.

Q. And the bill itself, wherever it was introduced, was made the subject of publicity, was it not? A. I don't know.

Q. You didn't observe that whenever there were hearings on the bill, that they were publicized by the use, by references to testimony that was hostile to explosives truckers?

MR. McGLOTHLIN: Objection, Your Honor.

That is a whole paragraph of assertions of fact not in evidence, and saying, "Didn't you observe that this was the fact?"

There isn't a shred of proof about publicity in South Carolina or in Nevada, about these bills.

4157 THE COURT: Well, you can put it in just the reverse -- was there any publicity in those states?

MR. McGLOTHLIN: He asked him whether he knew and he said, no, he didn't know.

That question has already been asked and answered.

THE COURT: Do you know if there was any publicity in those states when bills were being offered?

THE WITNESS: I know -- as I said -- of no publicity in connection with these bills.

THE COURT: No publicity?

THE WITNESS: That's right.

* * *

4158 BY MR. WRIGHT:

Q. I understand, Mr. Wickes, you yourself had nothing to do with

testifying in support of the bill or presenting any testimony in support of the bill in any State Legislature. That's correct, isn't it?

A. Nor of hearing evidence, nor of preparing anything, nor having any reports of what happened in the hearings, if there were any. I don't know whether there were hearings.

In other words, I have completed, to the best of my recollection, everything, every single thing that I did with respect to any bill.

On two occasions I handed a roll of film to someone who asked me for it, and someone who had brought me a second - or a third - or a fourth - hand message, who went off with the film, or who took it and delivered it, and at least after he left my office I didn't see it, and that completes my statement.

* * *

4171 OUT OF PRESENCE OF JURY BY THE COURT.

Now, you can't get away from it, there are very many violations that have been shown, not only against Riss but, I suppose, other companies. So it seems to me that you have to be pretty liberal on both sides in the introduction or in the allowance of testimony and exhibits going to the jury. I think I have tried to do that in this case, to give both sides a lot of latitude.

Now, the jury may come to the conclusion that this was all part of this conspiracy or scheme or plan, or whatever you call it, to drive Riss out of the trucking business, regardless of how bad their record may have been, because the old saying is: Just because a man is a criminal, or he goes out and kills somebody, that does not give you the right lawfully to kill him. This is not quite the analogy I should make, I suppose, but assuming that Riss did all the things that they say he did, that still would not give the railroads, if they were in a conspiracy, the right legally to do what they allegedly did, if the jury believes the plaintiff's theory of the case.

I can't see how you can try this case, except to give the jury the entire picture on both sides. I just can't see how you can do it.

* * *

4179 (Mr. Ball filed Objections of Defendants The Association of Western Railways and the individual Western Railroad defendants, as follows:)

"Plaintiff's Exhibits 116 and 116A

"These defendants object to the admission of these documents.

"1. Because they are privileged communications between counsel engaged in litigation, and relate at least in part to matters incident to trial preparation;

"2. For all of the reasons set forth with respect to Plaintiff's Exhibits 40, 41, 41-A, 42, 43 and 43-A.

Plaintiff's Exhibit 117 "(Wickes No. 31)

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66 and 68, and for the further reason that the source and authenticity of the document attached to the letter of December 4, 1952, has not been shown, and this document has not been shown to represent an official pronouncement of the Defense Department.

4180 "Plaintiff's Exhibit 122

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the letter shows on its face that the author of the letter was merely passing on to the recipients thereof information concerning a broadcast actually made over radio stations which are neither defendants in this case nor the agents of any of these defendants.

"2. That there is no evidence that any of these defendants was the author of the language used in the broadcast material or suggested the making of the broadcast or in any way were connected with the initiation or bringing about the broadcast.

"3. That the said broadcast material and the material quoted in the letter and the writing of the letter both constituted a right of fair comment on a matter of

4181 public concern and are within the guarantees of the First Amendment.

"4. That there is no evidence that any statement contained in the said broadcast or in the letter was untruthful or misleading.

"5. That the letter shows on its face that it was circulated only to members of the railroad industry and did not constitute any effort to defame the plaintiff.

"Plaintiff's Exhibit 124

"These defendants object to the admission of this document for the following reasons:

"1. That the said document is irrelevant, immaterial and incompetent to prove any issue in this case, and is hearsay as to these defendants.

"2. That there is no evidence to identify the authorship, origin or use made of this exhibit.

"3. That the exhibit relates to the exercise of the rights of assembly and petition guaranteed by the First Amendment."

* * *

4220 BY MR. WEST:

With respect to Plaintiff's Exhibit 112, I understood it came into evidence yesterday. At the time, Mr. Ball filed objections, and the objections were simply to say that he repeated the objections which he had made.

4221 THE COURT: Let me get that number, 112. Is that the letter from Mr. Wickes addressed to, "Gentlemen," the Operating Committee Report dated 12/26/51?

MR. WEST: That is it exactly, sir.

Mr. Ball's objections were by reference to the objections he had made to Exhibits 40, 41, 41-A, 42, 43 and 43-A.

Now, I am not entirely clear whether the objections to those documents which were again made with respect to 112 included an objection on the ground of privilege; so I would ask leave of Your Honor now to have the record show, so to speak, retroactively, that we made an objection on the ground of privilege, and on the ground of work product with respect to Plaintiff's Exhibit 112.

THE COURT: Very well, that will be done.

* * *

DIRECT EXAMINATION OF MR. WICKES BY MR. WRIGHT

4234 Q. The question is:

"You were not aware, you say, when you sent the film over to Annapolis, that the proponents of the bill were offering testimony or other exhibits intended to create the sentiment hostile to the truckers of explosives; you knew nothing about that?"

4235 I ask you first, whether there is anything in that question that you regard as false?

A. Yes, I regard it as a false statement to say, with no basis, that people at the legislative hearings were offering evidence to produce sentiment hostile to the truckers.

Q. Well, the question was directed to what you were aware of.

I want to call your attention specifically to the part that says, "when you sent the film over to Annapolis."

Do you now claim that you didn't send the film over to Annapolis?

A. I did not send the film over to Annapolis. I handed it, as I told you, to a man in my office, who brought to me a verbal request to use the film at Annapolis. He took it away. I heard nothing more about it until the film, itself, came back. So I don't even know of my own knowledge that it went to Annapolis.

* * *

4236 BY MR. WRIGHT:

Q. Now, you were aware, were you not, when you delivered the bill to the messenger, that the destination was Annapolis? Isn't that correct?

A. Delivered the bill, Mr. Wright? You are hard to hear.

Q. I beg your pardon? A. Did you say, "the bill"?

Q. Film, film.

A. I was aware of the request that had been made, Mr. Wright. It was not -- I will try to make this distinction clear. It was not my sending of the film to Annapolis. I had had a third- or fourth-hand, as I understood it, request to use it. I lent it to somebody or gave it to somebody in my office. My understanding, in fact, was that it was to go to Annapolis. I did not send it. The implication that I undertook actively to send that film to Annapolis is a falsehood.

4237 Q. Now, what was your understanding as to what would be done with the bill after it got to Annapolis -- the film after it got to Annapolis?

A. If all of the relayed information that I had through the several hands that I got was correct, the film would have been shown to a committee of the Maryland Legislature, which was considering a bill relating to the transportation of explosives.

Q. You got it back afterwards; did you not? A. That is right.

Q. I want to turn to your deposition again, Mr. Wickes.

* * *

4238 Q. You will recall that you were being questioned there about the inception of this so-called 5,000 pound bill. Do you remember the reference there to the Council of State Governments? A. Yes, sir.

Q. I want to direct your attention specifically to the questions and answers beginning at the bottom of Page 67 and going through the middle of Page 68, from Line 24 on 67 through Line 16 on 68. Do you recall you were asked this question:

"And then what if any action did you, yourself, take with respect to that resolution of the Council of State Governments?"

And your answer was:

"My recollection is that I thought it was unworkable as proposed by them, but that with much of the same language proposed, a 5000 pound limitation would be more practicable than absolute prohibition, and I think I made that proposal . . ." -- it says, "proposed," here -- ". . . in writing to someone."

The question was:

"You don't recall to whom?

4239 "Answer: No, I do not. I think it was someone in the Association of Western Railroads.

"Question: Mr. Hayes?

"Answer: I don't remember to whom I specifically made the recommendation, Mr. Wright. It would have been to Mr. Hayes' office.

"Question: You didn't have any correspondence with the Council of State Governments about it?

"Answer: No, sir."

Now, is that testimony that I just read to you correct?

THE COURT: Just a minute.

MR. BALL: I move to strike out of the record any reference to what the witness thinks he might have done in connection with the Western Railroads.

THE COURT: He is quoting some of his testimony.

MR. BALL: The point is that the quotation is in the record now without opportunity to interpose an objection to the answer at the time.

THE COURT: I will overrule the objection.

Do you under the question asked?

THE WITNESS: These answers made -- I am quite sure -- accurately reflected the state of my mind when Mr. Wright was cross-examining me in 1955.

4240 THE COURT: All right, let's proceed.

BY MR. WRIGHT:

Q. Well, is there anything about the state of your mind that has changed so that as you sit there now you think those answers weren't true? That is what I am interested in, Mr. Wickes -- whether or not the testimony you gave then was true or whether it wasn't?

A. I was talking about what I thought and believed and remembered and I believe -- and I know I was attempting to tell the truth about what I thought and believed and remembered.

Q. Is it the truth as far as you know now? That is what I am trying to find out from you, Mr. Wickes.

A. Is what the truth?

THE COURT: What he wants to find out, I think --

MR. WRIGHT: What you said here.

THE COURT: -- is,what you said back in 1955, do you say that that was a truthful statement, as of today? That is what you want to find out?

MR. WRIGHT: Precisely, Your Honor.

THE COURT: All right. As of today.

THE WITNESS: This is what I have attempted to say, sir. Yes.

4241 THE COURT: All right.

BY MR. WRIGHT:

Q. Now, will you turn next over to Page 69, and I want to direct your attention to the questions and answers beginning at Line 14 on 69, and going over through Line 17 on Page 70.

. Do you recall the question:

"Well, the bill you are referring to as having been sponsored by the Council of State Governments, then, was not a weight limitation, is that correct?"

You answered:

"That is right, sir.

"Question: And the weight limitation was your own idea?

"Answer: That is my recollection, sir.

"Question: And do you recall how you happened to evolve the weight limitation?

"Answer: It seemed to me that an absolute prohibition was quite unworkable from a transportation point of view, but that a weight limitation would be both healthy and feasible.

"Question: Now, that impression was derived from some conversations you had with someone, was it?

4242 "Answer: No. That was, so far as I know, derived from the contemplation of what kind of legislation might be useful to solve the problem.

"Question: Did you discuss the problem with the Pennsylvania's explosives expert -- what was his name?

"Answer: W. A. Kenney.

"Question: Mr. Kenney.

"Answer: No.

"Question: You had no discussion with him about it at any time?

"Answer: No, sir.

"Question: And had you had any discussion with anyone else about this weight limitation proposal?

"Answer: Not that I remember, sir.

"Question: This weight limitation was just a product of your own thought, without any discussion with anyone?

"Answer: As far as I remember."

Now, is that testimony that you gave then true and correct testimony as of now?

A. To the best of my knowledge and belief.

Q. I want to direct your attention to the fact that continuing on Page 70, you were asked about the correspondence or a letter to Mr. Hayes' office.

4243 MR. BALL: I move to have any reference to letters and correspondence with Mr. Hayes' office stricken unless there is some identification of what they were.

THE COURT: Can you identify the letter or correspondence?

MR. WRIGHT: He has the transcript in front of him there.

THE COURT: All right, let's find out what it is.

MR. BALL: That does not identify it for the sake of the Jury.

THE COURT: He is repeating some questions.

MR. BALL: He was summarizing.

MR. WRIGHT: My questions are just preliminary, to be sure that he understands what went ahead of questions and answers that I am going to read him beginning at Page 72.

MR. BALL: Well then, I move to strike out counsel's reference to correspondence with Mr. Hayes, which gets before the Jury an idea of something that is not in evidence.

THE COURT: Well, just a minute. As I understand it, this is just preliminary to his leading up to some other questions.

4244 MR. WRIGHT: Maybe I can do it this way. I will read him these questions and answers on Page 71, which I think will satisfy Mr. Ball.

BY MR. WRIGHT:

Q. I am looking at line. 3 on 71, Mr. Wickes.

"Question: Did you discuss the subject matter of the letter with Mr. Hayes or anyone in his office after you wrote the letter?

"Answer: Not that I remember.

"Question: Do you recall getting any kind of acknowledgment from his office, either oral or in writing?

"Answer: I do not.

"Question: And did you have any further discussion of the proposal with anyone, either in writing or orally?

"Answer: Yes, sir.

"Question: With whom?

"Answer: With Mr. Hayes, sometime later.

"Question: When was that?

"Answer: Mr. Hayes indicated that -- I'm sorry, I don't know the time.

"Question: Any idea how long it was after you wrote the letter?

"Answer: My recollection is that it was some time later. I had pretty much forgotten about the thing.

4245 "Question: Where was this discussion?

"Answer: On the telephone. Mr. Hayes was in Chicago and I was in Philadelphia.

"Question: And do you recall what the occasion for the call was?

"Answer: Mr. Hayes wanted me to meet him in Washington.

"Question: To talk about this proposal?

"Answer: Yes, sir.

"Question: Well, that was the first acknowledgment you had had of the letter or your recommendation?

"Answer: To the best of my recollection, Mr. Wright.

"Question: And was that all that was said over the telephone at that time?

"Answer: Yes,sir.

"Question: Did you meet him in Washington?

"Answer: Yes, sir.

"Question: Where?

"Answer: I met him at the Mayflower Hotel.

"Question: Who else was present there?

"Answer: No one besides Mr. Hayes.

4246 "Question: And you cannot recall the date of that meeting?

"Answer: No, sir.

"Question: Just sometime in '52?

"Answer: Yes, sir, I believe it was."

MR. BALL: Thank you.

BY MR. WRIGHT:

Q. Now, I want to go on from there and read through your testimony through Page 75, line 16.

The next question was:

. What was said then?

"Answer: Mr. Hayes said that he would like me to go with him to discuss the feasibility of a bill which I then read and included this provision.

"Question: This was a bill he had brought with him?

"Answer: Yes, sir.

"Question: Was it printed?

"Answer: Simply a typescript.

"Question: Well, go ahead and just give me the substance of the conversation.

"Answer: Mr. Hayes wanted me to talk with him to a gentleman by the name of Hahn, who, as I gathered from Mr. Hayes, was chairman or national executive secretary or something of the kind of the Association of Sheriffs -- National Sheriffs Association, I believe is the name of the organization. I went with Mr. Hayes and discussed the matter with Mr. Hahn merely to review what the bill was about, what the benefits to the public would be, and left it in Mr. Hahn's hands.

4247 "Question: Did Mr. Hayes tell you why he wanted to have you talk to Mr. Hahn about this matter?

"Answer: Mr. Hayes and/or Mr. Hahn indicated that --

"Question: Well, first I am confining my questions to what happened at the meeting between you and Mr. Hayes. I take it that Mr. Hahn was not present there, is that right?

"Answer: Oh, no. I don't remember anything more than that I saw the bill and that Mr. Hayes wanted to discuss the matter in my presence with Mr. Hahn.

"Question: Didn't he tell you why he wanted to discuss it with Hahn?

"Answer: I don't think it would be necessary, sir, so I doubt if he did.

4248 "Question: Why do you say it wouldn't have been necessary?

"Answer: I knew what the bill was. I had participated in earlier discussions about this kind of legislation for some time, and I knew the purpose of it. So that it would not be necessary to say to me what we wanted to do with it.

"Question: Now, who were those discussions had with you?

"Answer: I don't remember, Mr. Wright.

"Question: Did you discuss the purpose of the bill?

"Answer: I don't remember.

"Question: You don't have any idea of who those people were?

"Answer: Outside of the limitation that I have told you; that it was undoubtedly counsel involved on the protestant side of the Riss and Sub. 84 proceedings during the winter of '51 and '52.

"Question: Now, then, you say that you met Mr. Hahn after this first meeting. How long was that. Was that the same day or later?

"Answer: It was the same day, a matter of half-and-hour.

4249 "Question: Same Place?

"Answer: No, sir. At Mr. Hahn's office.

"Question: Where was his office?

"Answer: In Washington. I don't remember where.

"Question: He had a permanent office here?

"Answer: Yes, sir.

"Question: Who else was present then?

"Answer: No one besides Mr. Hahn and Mr. Hayes and myself.

"Question: What was said then?

"Answer: Mr. Hahn was handed the bill, its sources and purposes described to him, and to the best of my recollection, Mr. Hahn thought that the purpose of the bill was consistent with the purposes of the members of his organization, and that he would pass it along as a suggestion to them, and possibly reprint the bill in some kind of publication that Mr. Hahn edits or publishes on behalf of his organization.

"Question: What did you and Mr. Hayes tell Mr. Hahn as to the purpose of the bill?

"Answer: I have no specific recollection, Mr. Wright. I can guess for you.

4250 "Question: Well, I would rather not have you guess. I would just like to know, have the best recollection you have got, as to what you told him.

"Answer: I have no recollection of telling him anything specific at all."

Now, were those answers that you gave there, that I read to you, true and correct -- are they true and correct as of now?

A. I believe so.

MR. WRIGHT: Would you read the answer to me? I didn't get it.

(Whereupon the answer was read by the reporter.)

BY MR. WRIGHT:

Q. Now, I want to call your attention, Mr. Wickes, to the testimony immediately following that. That was the conclusion of the morning session.

At the beginning of the afternoon session there, that is, at Page 76, Line 7:

"This morning, Mr. Wickes . . ."

The question from me:

"This morning, Mr. Wickes, I think the last question referred to in the conversation you'd had with the representative of the Sheriffs' Association, and then I would like to know what the next time was that you had any discussion with anyone about this 5,000-pound-limitation legislation.

4251 "Answer: If my recollection of the sequence of events is correct, it was merely the request that I have spoken of earlier from some brotherhood representative that we lend him the film. Subsequent to that -- if that was the next occasion -- the next and as far as I know the only occasion was when I brought up the subject and proposed that the Eastern Railroads take a position in favor of legislation of that kind.

"Question: Now, when did you do that?

"Answer: I believe that was toward the end of 1952 or possibly early in '53.

"Question: Now, who did you make that recommendation to?

"Answer: I believe that I made that recommendation to possibly Mr. Hardy and Mr. Strouse as something that could be tied together from the point of view of the work they were doing with the objectives that I felt were the objectives of our participation in protesting these various explosives applications.

4252 "Question: Can you recall where it was that you met with them to discuss this matter?

"Answer: I know that at some time during that period I met with Mr. Hill, Mr. Hardy, Mr. Strouse, and possibly one or two other people in New York, and I believe that that subject was discussed at that time.

"Question: Now, do you recall what the occasion for that meeting was?

"Answer: I believe that the meeting was primarily for the purpose of going over the general activity that Byoir had been carrying on pursuant to my earlier suggestion and to see whether there was anything further we should do or anything more we should do or anything different we should do. I think it was a very general discussion.

"Question: Where was this meeting?

"Answer: In New York.

"Question: Where in New York?

"Answer: At the offices of Carl Byoir."

MR. WRIGHT: Now, I want to have marked for identification with the next Plaintiff's Exhibit number the document that was listed in the prima facie case Document No. 53. It is a letter from Richard Strouse of Byoir to Mr. Frank Masterson, Motor Carrier Bureau, bearing the stamped date, September 2, 1952, and indicating carbon copies to: Del Beman, Edgar Hill, Bill Hutchinson, Coly Hardy, Sam McCartney, Walter Renz, Lewin Wickes, Jr., and Lyle Youngstrom.

4253 THE COURT: All right. Are you offering that into evidence?

MR. WRIGHT: That has been authenticated. I offer it in evidence now.

THE COURT: Where did it come from?

MR. WRIGHT: I have the statement here that was submitted to Your Honor.

This document came to us from the files of the TEA.

THE COURT: All right. Now, against which defendant or defendants are you offering this exhibit?

MR. WRIGHT: I am offering this document against the TEA, and Carl Byoir at the moment, and after I examine the witness about it, I may offer it against others.

THE COURT: All right. Are there any objections?

You may file your objections, or submit them.

THE CLERK: Plaintiff's Exhibit No. 126

(Objections of Defendants The Association of Western Railways and the Individual Western Railroad Defendants are as follows:)

4254 "Plaintiff's Exhibit 126

"(Document No. 53)

"These defendants object to the admission of this document for all of the reasons set forth with respect to Plaintiff's Exhibits 49, 50, 66, and 68, and for the following reasons:

"1. That the letter relates in large measure to ICC proceedings involving Hoover, Southwestern and Baggett, which are not among the ICC proceedings in which plaintiff contends that these defendants abused their privilege of intervention.

"2. That the said document contains incompetent expressions of opinions and conclusions.

"3. That the said document contains incompetent assertions of actions to be taken in the future, which are not shown to have taken place.

"4. That the said document is replete with incompetent hearsay statements as to the state of mind, the responsibilities, and the intentions of persons other than the author of the letter."

(Objections of Defendants 11, 29 and 66 are as follows:)

4255 "Defendants 11 and 29 and 66 object to the admission into evidence of each of the following exhibits on the grounds that:

"1. The authenticity of the exhibit has not been established.

"2. The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

"3. The document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

"4. The document is not a declaration in furtherance of any conspiracy.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

"124, 125, 126."

THE COURT: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 126, letter dated September 2, 1952 from Strouse to Masterson, was marked and received in evidence.)

4256 BY MR. WRIGHT:

Q. Mr. Wickes, I show you this letter that has been marked as Plaintiff's Exhibit 126 and ask you if you received a copy of that letter shortly after it was written?

A. I believe that I did.

Q. Now, does that letter refresh your recollection as to whether or not that was the meeting you were referring to at Page 77 of your 1955 deposition?

A. My recollection is that it was.

Q. Now, would you read that?

MR. WRIGHT: Excuse me. I will read it.

THE COURT: Either you or Mr. Layne. It doesn't make any difference.

Do you want to read it?

MR. LAYNE: I will read it.

THE COURT: All right, we will read this letter.

MR. LAYNE: Plaintiff's Exhibit No. 126 is on the stationery of Carl Byoir & Associates, Inc. It is a letter that bears the stamped dated, September 2, 1952. The letter is to Mr. Frank Masterson, Motor Carrier Bureau, 1 Park Avenue, New York 16, New York; signed by Richard Strouse, "Most sincerely, Dick".

"Mr. Frank Masterson
Motor Carrier Bureau
1 Park Avenue
New York 16, New York

"Dear Frank:

4257 "Tuesday's meeting was, I think, highly successful despite (certainly not because of) your absence. Messrs. Hill, Renz, Wickes, McCartney, Hardy, Sears (from our office) and Strouse were present. We had a good general discussion, and Ed Hill filled us in on some railroad attitudes that I know will prove helpful to us.

"Four main specifics were considered:

"1. Lew Wickes wants Byoir to give you fellows more help in fighting truckers' applications in general -- not just explosives' applications, but all kinds. This involves a policy decision which of course we at Byoir can't make. Coly Hardy is going to take up Lew's suggestion with the appropriate railroad committees at the earliest possible time.

"2. All the railroad men at the meeting want Byoir to keep the pressure on Riss in every way, and particularly as regards the trucking of explosives. Everyone agreed that nothing can be done now about the Riss application, since the briefs are all in. But there is the 'cease

4258 and desist' order. Presently, as you of course know, the 'cease and desist' thing is involved in a Kansas City Court, and that involves us (Byoir) in a jurisdictional question. We are supposed to act only in the 17 Northeastern states, of which Missouri is not one. We understand of course, that Kansas City is simply the locale of a court action in which is primarily a Washington, D. C. situation, but we nevertheless must watch our protocol. Hardy is going to take this up with Joe Hays, and either the Western railroads or Byoir will definitely be responsible for Kansas City. If Hardy and Hays decide it's a western responsibility, we will give Hays every help we possibly can. Wickes has already sent me some valuable updating material. The situation seems to warrant a background memo to editors pointing out how Riss has prevented an ICC decision from going into effect, and also pointing out that a private trucker has sued the U. S. Government, but exactly what will be done will have to await the Hays-Hardy decision.

4259 "3. Strouse complained (not very bitterly) at the meeting that the fiendish railroad people had not kept him informed of all aspects of the explosives cases before the ICC, and noted in particular that he had not been told about the Hoover and Southwestern explosives application. Hill, Wickes, Renz and McCartney passed the buck to Masterson, saying that he was in the best spot to know of all applications. Could you, therefore, Frank, in the future please be sure to notify me of all applications -- including those not in our territory? Such additional information often helps to expand the scope -- therefore the potential usability -- of a news story.

"4. A modus operandi for Baggett was agreed upon. It is outlined below.

"The next step in L'Affaire Baggett is the Division 5 decision. If it is favorable to us -- if it reverses the examiner, that is -- we, of course, want to exploit it. The meeting adopted the following procedure:

"a. This office will prepare a dummy or tentative press release announcing a favorable Division 5 decision. Attribution will be your Washington office. Release will
4260 contain all the relevant background information, and space for quotes from the Division 5 decision when it is announced.

"b. Release will be sent to Del Beman in our Washington office, with copies to you.

"c. Your Washington man -- I believe he's Gene Salcetti -- will be 'ordered' by you to check with the ICC every afternoon. As I understand it, mimeographed copies of ICC decisions are placed on a press table around 4 p.m.; it will be Salcetti's responsibility to look over the table every day. According to Hill, Renz, and Wickes, that seems to be the only way we can learn of the Division 5 decision.

"If by any chance you or Salcetti hears of the decision before it is announced, you will of course tip off Beman and/or me.

"d. When the decision turns up, Salcetti will, if it's unfavorable, let Beman know and everyone will forget the matter. If the decision is favorable to us, however, Salcetti will take it immediately to Beman in our Washington Office (that's Room 829 National Press Bldg., Sterling 6565).
4261 Beman will revise the dummy press release into a real one with the information contained in the decision, and will have the release mimeographed.

"e. Beman will decide to whom and by what method the release should be distributed. If he considers envelopes to be necessary, Salcetti will furnish Beman with the requisite number of Motor Carrier Bureau Washington office envelopes, and Beman will have them addressed.

"f. Salcetti and Beman will distribute the press release. That is, the release will come from Salcetti's office and he will be responsible for physically getting it around. Beman will advise him on methods of distribution, and will use Byoir contacts and know-how to help get maximum coverage. Beman will use Byoir facilities to help Salcetti plan whenever Beman thinks this will be useful.

"g. Beman will notify Strouse, who will try to pull the story up to New York on the wires.

"h. If the decision turns up late in the afternoon, as Hill thinks it will, release will be headed FOR IMME-
4262 DIATE RELEASE and as widespread distribution as possible will be made that night. Certainly, the wire services, the Washington and New York morning dailies and any other morning papers that Beman knows are particularly interested in the story should get the release that night. Any distribution that cannot be made that night will be made the next morning.

"i. Beman will work out the list of addresses and method of distribution in advance.

"j. Beman will let Salcetti know who to contact should Beman not be in the Byoir office.

"k. Beman and Strouse will try to work out a follow-up comment by the AAA.

"I guess that does it, Frank. If you think the Baggett procedure is sound, will you let Salcetti know of his responsibilities? I'm not sending him a copy of this.

"Please let me know if anything isn't clear, or if you want additional information on any of the subjects.

"Most sincerely, Dick."

Typed, "Richard Strouse."

"Copies: Del Beman, Edgar Hill, Bill Hutchinson,

4263 Coly Hardy, Sam McCartney, Walter Renz, Lewin Wickes, Jr., Lyle Youngstrom."

* * *

4264 BY MR. WRIGHT:

Q. Mr. Wickes, you have that Exhibit 26 in front of you there?

A. 126?

Q. Yes.

A. Yes, sir.

Q. Mr. Strouse's letter to Mr. Masterson?

A. Yes, sir.

Q. Since you have that and you heard Mr. Layne read that, does that refresh your recollection as to just who was at that meeting that is referred to in the letter?

A. It doesn't refresh my present recollection, except possibly for McCarthey.

Q. Well, that is what I wonder, if you recall who the railroad men were at the meeting, were, other than yourself.

A. I know what Mr. Strouse says.

Q. I am asking you for your own recollection.

4265 A. Well, Mr. McCarthy was a railroad man. He worked in the offices of the Pennsylvania Railroad in Philadelphia.

Q. That is the only one you can recall, that is, other than yourself?

A. I was there, but I have no visual picture of the meeting, sir.

Q. Well, I want to go back again to your deposition there at the top of page 78, where the question at line 5 is asked you, and this was with reference to what happened at the meeting:

"Q. And can you just give us the substance of what was said about this 5,000-pound legislation?

Your answer was:

"I think that I proposed that the railroad adopt a policy favoring such legislation and that I did this on the basis that it fitted in with the objectives of the protest to the applications, that that kind of lengthy procedure and what not could be solved if there were legislation of this kind. It would avoid a whole lot more application cases and at the same time would fit into the public relations activities that Byoir had been carrying on in this area."

Now, do you recall that that was your testimony at the time?

4266 A. It is in the deposition, sir.

Q. Is that a correct statement as of now?

A. I think it is.

Q. I continue:

"Now, what was said by anyone else?

"A. I don't remember anything that was said by anyone else.

"Q. Do you recall what the nature of the response, if any, was to your suggestion by anyone at the meeting?

"A. I believe at that meeting the sense of the meeting was that the proposal was a sound one.

"Q. But you don't have any recollection as to who said what?

"A. Excuse me, sir. May I say that we were not in a

position to decide anything, but merely to review and put ourselves in a position to make some kind of recommendation.

"Q. And then after the meeting, a recommendation in accordance with your suggestion was made?

"A. I don't know that it ever was.

"Q. Well, what if anything did you do about it after the meeting?

"A. to my recollection, I did nothing further, with the one following exception that I mentioned earlier, that is, the
4267 lending of the real of film with the sound track on it through the same channels just this year, this winter's session of the Maryland Legislature."

You were referring there to the '55 session, were you?

A. The deposition was in '55.

Q. Was your testimony correct as you have given it there?

A. I believe it is.

Q. Then the next question is:

"Well, now, after this meeting, do I understand you to say you had no further discussion with any of the people who had been present there about the fate of this recommendation?

"A. That is right, sir.

"A. I remember seeing a letter at some time in which Mr. Hardy stated that this seemed from his point of view to fit in with the thing from the public relations point of view, but that it was a policy matter and he could not decide it. I knew that I couldn't decide it. And that is the last I remember about it.

"Q. And you had no discussion of it with any railroad people subsequent to this meeting?

"A. No, sir. I am quite sure that nothing substantial
4268 was ever done beyond that.

"Q. My question wasn't directed to what the others

might have done. What I want to know is what you yourself did with respect to it.

"A. I meant nothing was done by me or anybody else, except the letter from Hardy explaining the situation from his point of view. I simply accepted the letter as what it was.

"Q. Now, this letter you are referring to was received by you when?

"A. I believe it was after the meeting sometime.

"Q. You don't recall how long?

"A. No, sir.

"Q. There was nothing said, however, in the letter, I take it, to the effect or as to what would or would not be done in connection with the legislation?

"A. Well, the letter stated that Byoir couldn't do anything in the absence of a policy on the part of the railroads and that he couldn't decide policy."

And that was your correct testimony, wasn't it?

A. I believe so.

Q. And the next question:

"And you don't know what if anything later was done with respect to railroad policy in that connection?

4269 "A. I am pretty sure that nothing was done, Mr. Wright.

"Q. Did you ever make any effort to find out?

"A. If anything had been done, I would have been likely to be the person to do it, and I don't believe I did anything on that.

"Q. Did you ask anyone about the matter, as to what should be done or what had happened to the recommendation?

"A. Not to my recollection.

"Q. You don't recall making any inquiry of that kind?

"A. I do not.

"Q. And you say that you discussed the legislation with no one from the time of this meeting until the request was made for the use of the film in connection with the Maryland Legislative session?

"A. I don't remember any other discussion of that legislation."

Now, was that testimony correct at the time you gave it?

A. Well, I am not sure. The testimony is, is as asked and answered there, perfectly clear, that my recollection then and my recollection now is that Hardy's letter, which was referred to a page or so back, saying that he could not decide policy on legislation, put a complete stop to it. I mean, this as far as I was concerned was the end of it.

4270 I think that is what I meant to say, but I am not sure that just as you read it it sounded that way.

Q. What I was addressing myself to, Mr. Wickes, and your attention to, was the question of whether you had now remembered any other discussion about that legislation that you didn't remember then?

A. It doesn't remind me of any.

Q. Your recollection is exhausted, then, as to any subsequent discussion?

A. I believe it is.

Q. All right. Now, will you turn to the last volume there, at page 246, volume 3, and I just wanted to call your attention to the last questions you were asked about the 5,000-pound bill, and do you see it beginning at line 20 on page 246? A. Yes, sir.

Q. Just a couple of more questions I was going to ask about the 5,000-pound bill.

"Did you yourself, Mr. Wickes, make any effort to determine what Legislature that bill was actually presented to and what happened to it?

"A. No, sir, I did not.

"Q. And did you receive any information in that
4271 connection from time to time?"

And you answered:

"Yes, sir.

"Q. That came from whom'

"A. I told you about two occasions, both concerning Maryland, and there was one other instance in which I was given to believe by somebody, but I do not remember who it was, that at or about the same time the bill was introduced in the Maryland Legislature, it was also introduced in the Indiana Legislature.

"Q. And those were the only two instances that came to your attention of action on the bill, was in Maryland and Indiana?

"A. That is right, sir.

"Q. Now, did you have any discussion with anyone at any time about possible upward revision of that 5,000-pound limitation or any amendments to the proposed model bill of any kind?

"A. No, sir."

That was correct testimony when it was given, wasn't it?

A. I believe so.

Q. Now, have you recalled since that time any other instances than those you mentioned where your attention was drawn to action being
4272 taken on bills of that kind in other states than Maryland and Indiana?

A. Well, the paper that is now marked Exhibit 124 has a Nevada proposal, and several other different references to Nevada written on it; and in the course of the preparation of this case in the past five years, I think that I have seen some other references to the bill in other states, but I, of course, have no connection with and know very little

about states like Nevada.

Q. Well, has that exhausted your present recollection then about what was done about the bill in the various state legislatures?

A. Yes, I believe it has.

Q. Would you please read the bill now, 124? Is that bill in front of you?

MR. PIERPOINT: Your Honor, a few pages back in the deposition counsel was reading in the deposition Mr. Wickes's answer with respect to a document, a letter attributed to Mr. Hardy, and that document, I believe, was one of the ones that we received and is indicated as part of the prima facie case. I wonder if Mr. Wright was going to introduce it?

THE COURT: Well, if he doesn't introduce it, and you think it is material, on redirect you may inquire about it.

MR. PIERPOINT: I wonder if he is going to introduce it.

4273 THE COURT: I don't know whether he overlooked it or he doesn't want to introduce it.

MR. PIERPOINT: Well, as an evidentiary matter, it is the best evidence.

MR. WRIGHT: I didn't overlook it, but Mr. Wickes's testimony about the substance of the letter I thought was correct, and I thought it was much shorter than the letter itself. If he wants to offer it, he may.

THE COURT: All right. Do you wish to offer it, I mean, at the proper time?

He said he was satisfied with the explanation of Mr. Wickes.

MR. PIERPOINT: Your Honor, I still think it is Mr. Wickes's description of the letter at a time he didn't have it before him, and the letter is the best evidence.

THE COURT: This is cross examination, you know. Do you have any objection to counsel showing him the letter?

MR. WRIGHT: Oh, not at all. In fact, if the letter would result in any change in the testimony --

THE COURT: He might want to add something to his testimony.

MR. WRIGHT: Of course, he would be in a position to do that. If he wants to do it now, that is all right.

THE COURT: Let us do it now. Show him the letter.

MR. PIERPOINT: Your Honor, do you want it marked in any

4274 way? Do you want me to mark it with a Plaintiff's number?

MR. WRIGHT: Give it a defendants' number, for identification, I presume.

THE COURT: You don't have to offer it in evidence. He can read from it.

(The document was marked Defendant No. 5, C B & A No. 1 for identification, a letter from Colburn to Wickes, dated December 29, 1952.)

BY MR. PIERPOINT:

Q. Mr. Wickes, I show you a document, marked Defendant No. 5, Exhibit 1 for identification, and tell us what that is?

A. The letter is on stationary of Carl Byoir and Associates, and it is addressed to me and signed Colburn, for C. Colburn Hardy, dated December 29, 1952.

Q. Is that the letter that you were referring to in your deposition that was read just a minute ago? A. I believe it is.

Q. Would you read that, sir?

A. It is addressed to Mr. Lewin W. Wickes, Jr., Legal Department, Pennsylvania Railroad, Broad Street Station Building, Philadelphia 4, Pennsylvania.

(Reading)

"Dear Lew:

4275 "Perhaps this will help to clarify the situation on Legislation regarding explosives. Since these will be state laws, they must be approved by the associated railroads of each state. As a matter of policy, we are instructed to take no action in any state without the approval of the state association.

"The problem now seems to be just what type of legislation should be introduced. If you people can come up with a model bill, we will be glad to get it introduced and publicized. It seems to me that there should be approval from two groups -- 1. the traffic people who deal with the problem and 2. the legal people who are familiar with the legislative requirements in each state.

"In talking with our committee, it is their feeling that they will be glad to cooperate once a policy has been determined, but they are reluctant to act on policy matters about which they have little knowledge.

"One of the problems which has been presented is just what type of bill to sponsor. Pennsylvania has one based on permits, while Joe Hays seems to prefer one based on weight limitation. We will be glad to do all we can, but please remember that our job is publicity rather than policy.

4276 "Signed, Sincerely, Colburn."

BY MR. WRIGHT:

Q. Does that letter suggest to you any change in your testimony that you have previously given?

THE COURT: Just a minute. Mr. Ball.

MR. BALL: I move to strike out the portion of the letter that relates to what Joe Hays feels, as being purely hearsay.

THE COURT: All right, I will overrule it.

THE WITNESS: This is the letter I was talking about, and it seems to me my testimony has been consistent about it, and it is as I believe to be the fact.

BY MR. WRIGHT:

Q. You and I are in agreement. A. Yes, sir.

Q. Now, will you please read Exhibit 124?

A. I don't have that.

MR. McGLOTHLIN: May I ask him a question, Your Honor?

THE COURT: Yes, sir.

MR. McGLOTHLIN: Mr. Wright, what part were you reading --

MR. WRIGHT: The typed part, the typing there.

MR. McGLOTHLIN: I haven't finished the question.

4277 What part of Mr. Wickes's deposition was it that you questioned him about, the last page?

MR. WRIGHT: Do you want all the references, beginning at page 67?

MR. McGLOTHLIN: Is that where it started?

MR. WRIGHT: 67, and I have got the pages marked with notations in here.

MR. McGLOTHLIN: May I glance at it a moment, Your Honor?

THE COURT: You may.

MR. McGLOTHLIN: If Your Honor please, my difficulty is simply this: Asking Mr. Wickes to read it, of course, implies that he wrote it, and I may be wrong, but my recollection of this as I read it was that the first time he saw an actual weight limit bill was when one was brought to him and he saw it in Washington, and I don't think the evidence shows he wrote this while in draft. If it does, I withdraw my objection. But I can't find it.

MR. WRIGHT: Mr. Layne can read it. I don't insist on him reading it, if he doesn't want to read it.

MR. McGLOTHLIN: No, that is not it.

THE COURT: I don't think he meant that.

MR. McGLOTHLIN: No, I wanted to clear up a point, that is all.

THE COURT: He wanted to clear up a point, I think.

4278 MR. BALL: May we approach the bench, Your Honor?

THE COURT: Yes.

(Thereupon counsel approached the bench and the following

occurred:)

MR. BALL: I was caught a little bit by the attorney for Carl Byoir having him read in that letter, which, of course, the Court would not admit at this time as against the AWR, but having it read or offered as part of the testimony of the witness, whose testimony was then being offered, I think this was as to my defendants hearsay, and hearsay of an opinion, and that is really within the ruling of the Court and it should be stricken.

THE COURT: Let me have the document.

MR. BALL: If this had been offered as a document, I would have been in a position to offer objection, and I want the Court to understand my problem.

THE COURT: Let me read this.

What part are you referring to, the next to the last paragraph?

MR. BALL: That part about Joe Hays's feelings.

THE COURT: What part are you talking about, Mr. Ball, the part "In talking with our committee"?

MR. BALL: I am sorry, but I came without my glasses.

THE COURT: Is this it? "One of the problems which has been presented is just what type of bill to sponsor. Pennsylvania has one based

4279 on permits, while Joe Hays seems to prefer one based on weight limitations. We will be glad to do all we can, but please remember that our job is publicity rather than policy."

Do you object to that last paragraph?

MR. BALL: I object to it going in evidence in here through that letter as what Joe Hays is supposed to have felt or recommended, because if this had been offered as a separate document it could not have gone in, and I think that at this stage of the game that the jury should not have received it, and I say that is evidence going against my defendants.

THE COURT: Let us find out how much got into the record.

Mr. Wright, you asked a question, and apparently Mr. Pierpoint thought that what the witness said was not in conformity with what Mr.

Hardy had said in the letter of December 29, 1952, to Mr. Wickes.

MR. WRIGHT: Yes.

THE COURT: Or didn't state the substance of what was in the letter.

MR. WRIGHT: I thought it did, and the witness thought it did, and Mr. Pierpoint disagreed with us.

THE COURT: He did in the end, in effect. I forget the words he used.

MR. PIERPOINT: To make it plain, Your Honor, this document
4280 makes it perfectly clear that Carl Byoir's participation in this situation was publicity and not policy.

Now, that is not anything that was made nearly as clear in the testimony of the witness in the deposition when he didn't have the document before him, and my object was to get a description of the document to be offered when the time comes.

THE COURT: Do you want the question to stand in the record? Do you disagree with it?

MR. PIERPOINT: We didn't know about Hays.

THE COURT: Suppose I have the last paragraph left out?

MR. WRIGHT: As far as Byoir is concerned, we don't have any dispute with Mr. Pierpoint about the fact that Byoir wasn't making policy, and these bills, actually, the workings in this document show that all these bills are turned over to the state railroad associations, and they were the ones who handled the legislation and Byoir did not. The legislation was handled by the state railroad associations and that is their business, but Byoir dealt with both, and we talked about what we found to be the fact.

MR. PIERPOINT: But just as a general proposition, it seems to me it is important to my client, and this is a contemporaneous writing, and it is important to my client, and if everybody was informed that my client's job was publicity and not policy.

4281 In terms of the way this case is coming in, it seems to me that my client should have the benefit of getting before the jury a contemporaneous document, which they through their clients show that their job is publicity and not policy.

THE COURT: That is what you want to get before the jury, that last paragraph?

MR. PIERPOINT: Yes, sir.

MR. WRIGHT: Nothing is before the jury now, and no contention has been made that Byoir ever made railroad policy or did anything to execute railroad orders. That is clear enough.

MR. BALL: I don't know what Byoir wants to do in that. Byoir read that as part of the witness's testimony, but which is being offered against my client, the AWR.

THE COURT: Suppose I tell them that last paragraph contains hearsay as against the AWR and it is not admissible against AWR.

MR. BALL: That is fine.

MR. PIERPOINT: That is all right.

THE COURT: Suppose I do that.

(Thereupon counsel resumed their places in the courtroom and the following occurred:)

4282 THE COURT: Ladies and gentlemen of the jury, in this letter just read to you by Mr. Wickes, I will read the last paragraph again. The letter is on the stationery of Carl Byoir & Associates, Inc., dated December 29, 1952, from C. Colburn Hardy to Mr. Lewin Wickes, Jr., Legal Department, Pennsylvania Railroad, Broad Street Station, Philadelphia. The last paragraph reads as follows:

> "One of the problems which has been presented is just what type of bill to sponsor. The Pennsylvania has one based on permits, while Joe Hays seems to prefer one based on weight limitation."

The Court has ruled that that would be hearsay as to the AWR,

which employs Joseph Hays, and you will disregard that as any evidence against AWR.

Is that satisfactory?

MR. BALL: Thank you.

THE COURT: All right.

MR. WRIGHT: I would still like to have this exhibit read. I don't care who reads it.

THE COURT: The exhibit? All right. Let Mr. Layne read it, then.

MR. LAYNE: Plaintiff's Exhibit 124 has in the upper right-hand corner "Hardy Exhibit No. 2 (I. D.). It has some handwritten material on the first page here. It appears to be "Draft, not yet introduced."

4283 And it has what looks to be a date, in handwritten form, which, as far as I can tell, looks like 2-5-53.

Also, in handwritten form at the top is "Nevada Proposal," underlined, and then a sort of a line put through it.

"Weight Limitation of Explosives Trucks" is in typing. Then underneath it it has "Nevada" in handwritten form. And then there is a parenthesis "Note," and the remainder is in typing --

> "Following is the draft of a statute to limit the amount of a load of explosives carried on the public highways to not more than 5, 000 pounds. In order to avoid conflict with the Federal Constitution it should be integrated as closely as possible with the laws of the state limiting the sizes and weights of motor vehicles. Because of differences among the laws of the various states, each state presents an individual job of draftsmanship in adapting this general draft to the use of the state."

End the parenthesis, and "Title" in caps:

> "Title to be drafted to fit needs of particular state.

4284 "BE IT ENACTED, ETC.

"Section 1. The term 'explosive' shall have the same meaning as in Section _____. (All states have definitions of explosives. It would be best to use an existing definition if it is a satisfactory one. A draft of a definition is attached in case it is needed.)

"Section 2. It shall be unlawful to transport upon the public highways of this state in or by a motor vehicle, semi-trailer, trailer or any combination thereof, any explosive or explosives in any quantity in excess of five thousand (5,000) pounds, except as provided in section 3 hereof.

'Section 3. The limitation of Section 2 of this Act shall not apply --

"(a) During any period of war as declared by the Congress of the United States.

"(b) To the movement of explosives in aid of mining or excavating operations or in aid of the discovery or production of oil or gas when such explosives are moved between any point or points not regularly served by any means of transportation other than transportation by motor vehicle and the nearest practical common carrier loading or unloading point.

4285 "(c) During any period of grave national emergency provided a permit for each movement of explosives in excess of five thousand (5,000) pounds is issued by the Governor of this state or by any public official designated by him, specifying the route or routes to be followed, the description of the vehicle to be used, the time of such movement, and any other precautions to be observed in such movement to protect the public safety.

"Section 4. (a) Every motor vehicle, semi-trailer, trailer, or any combination thereof, when used to transport any explosive or explosives on the public highways of this

state shall carry a placard or mark on the outside containing the word 'explosives' so placed as to be easily seen and read.

"(b) The driver of every motor vehicle used to transport any explosive or explosives shall at all times carry with him an inventory of the explosives so transported. Such inventory shall state plainly the weight in pounds of such explosives and the empty weight of the vehicle or combination of vehicles used for such transportation. Any false statement in such in-
4286 ventory shall constitute a violation of this Act.

"(c) It shall be the duty of peace officers to inspect and weigh or cause to be weighed vehicles carrying explosives, and to inspect the inventory carried by the driver, in order to enforce this Act.

"(d) Any person violating this Act shall be guilty of a misdemeanor. (Add penalties where necessary.)"

BY MR. WRIGHT:

Q. Mr. Wickes, at the time you had this conversation about 5,000-pound legislation of that kind -- with Mr. Hays and Mr. Hahn, was it here in Washington? A. Yes, sir.

Q. Did you know at that time what the average normal size of the average or normal truckload of military explosives and ammunition was?

A. Oh, I believe I knew within a limit.

Q. What was it?

A. My recollection of what I had seen would run from thirty to forty or forty-five thousand pounds.

Q. And the effect of that bill, if enacted in any state, would be to prevent the then transportation of military ammunition and explosives through the state in the quantities that were then being transported, would it not?

4287 MR. BALL: Object to the question as assuming something

contrary to the face of the bill, which does not apply in case of war and emergency and some other exceptions.

THE COURT: With that qualification, with these exceptions of in time of war and so on.

MR. SHEA: If the Court please, isn't this calling for a conclusion of the witness? I should think it would be objectionable on that ground.

THE COURT: Well, if he knows about it, I will let him testify.

THE WITNESS: I can say generally that subject to the sections 3 and 4 which provide various conditions under which different things can be done, the bill, as the copy I have before me reads, would permit the transportation of truckloads of 5,000 pounds of explosives, in contrast to the proposal of the Governors' Conference, which, while it had all these provisos, would prohibit the transportation of explosives by truck.

BY MR. WRIGHT:

Q. Now, will you just look at the proviso there, the first one you have got, and see if you can tell me whether or not that bill --

Look at Section 3 (a). Do you see that? A. Yes, I do.

4288 Q. That says, does it not --

"The limitation of Section 2 of this Act shall not apply --

"(a) During any period of war as declared by the Congress of the United States."

Now, were you aware at that time that the United States was engaged in a war which had not been preceded by any formal declaration of war by the Congress of the United States?

A. That is my recollection of the international setup, yes.

Q. So you knew that that particular exemption or limitation there would not prevent the bill from becoming effective during the Korean conflict? Is that right? A. No.

Q. You did know that or you did not know it?

A. I did not know it.

Q. You were not aware at the time that the Korean War had not been preceded by any formal declaration of war by the Congress of the United States?

A. I can't control Congress as to when it declares war and when it can't, Mr. Wright.

Q. I am sure you can't. I was just asking for your knowledge.

4289 A. I knew, I believe, that Congress had not declared war in the Korean conflict.

Q. Then the effect of the bill, if enacted at that time during the pendency of the Korea War would, would it not, have very severely restricted the ability of explosives truckers to transport ammunition and explosives in the United States?

MR. GATES: Just a minute, if Your Honor please.

THE COURT: Yes, sir.

MR. GATES: The question is argumentative and calls for a conclusion of the witness. The exhibit speaks for itself, and I don't think this witness should be asked to interpret it.

THE COURT: The only reason I am permitting him to ask the question is that it may be leading up to something; I don't know. The bill on its face, apparently, the way I read it, Section 2 states:

> "It shall be unlawful to transport upon the public highways of this state in or by a motor vehicle, semi-trailer, trailer or any combination thereof, any explosive or explosives in any quantity in excess of 5,000 pounds, except as provided in Section 3 hereof."

Section 3 is as follows, the exception:

"(a) During any period of war as declared by the Con-

4290 gress of the United States." Is that the only exception?

MR. WRIGHT: I beg your pardon?

THE COURT: Is that the only exception in the bill?

MR. WRIGHT: No. That is the only absolute exception, yes.

THE COURT: All right.

Now, the bill speaks for itself.

MR. BALL: Would the Court then read (c)?

THE COURT: I will read (a), (b), and (c). This is an exception, too --

"During any period of grave national emergency provided a permit for each movement of explosives in excess of 5,000 pounds is issued by the Governor of this state or by any public official designated by him, specifying the route or routes to be followed, the description of the vehicle to be used, the time of such movement, and any other precautions to be observed in such movement to protect the public safety."

All right.

BY MR. WRIGHT:

Q. Were you aware, Mr. Wickes, at that time that the Defense Department was opposed to this bill and specifically to those provisions you just referred to for permits?

4291 THE COURT: This is another question.

MR. GATES: As I understand it, Your Honor, and now my objection is, he is assuming facts not in evidence, that the Defense Department opposed it. There isn't any evidence in this record yet that says the Defense Department opposed it.

MR. WRIGHT: I propose to have a witness here who will describe firsthand exactly what position the Defense Department took, and why. All I am attempting to determine from this witness at this time is what he knew about that matter at this time.

THE COURT: You might ask him if he knew what position the Defense Department took.

MR. GATES: That question is not objectionable, Your Honor.

THE COURT: And after that evidence is offered, you may want to recall him.

BY MR. WRIGHT:

Q. Did you, Mr. Wickes, at that time, when you had this conversation with Mr. Hays and Mr. Hahn, which I believe you placed in early 1952 or late 1951 -- is that correct?

A. No; I believe it was some time during the late 1952, or the middle of 1952.

4292 Q. In any event, whenever it was, were you aware at that time, did you know, what if any position the Defense Department had taken with regard to restrictions of the kind that are embodied in this bill?

A. No, I did not.

MR. WRIGHT: Now, if the Court please, I want to have marked with the next plaintiff's exhibit number -- or I think it had better be marked 116-B. Actually, this is a letter from Mr. Wickes to Mr. Hays, dated August 20, 1952, which was referred to in the letter from Mr. Hays to Mr. Wickes which was received in evidence as 116-A, dated August 25, 1952. And I think that this should be numbered 116-B, because if it had been available -

THE COURT: B or D?

MR. WRIGHT: B.

THE COURT: Very well, 116-B. Is there any objection?

MR. GATES: We don't have a copy of it.

MR. BALL: There are no copies available.

THE COURT: This is one that a copy was not furnished. All right.

MR. WRIGHT: This is one that Mr. McGlothlin produced for the first time this morning. Nobody had it.

MR. BALL: Can we file our objections?

THE COURT: You can file your objections later.

4293 MR. GATES: Your Honor, can we see it for just a moment?

THE COURT: Yes. You weren't here when this happened.

MR. GATES: I would like to look at it for just a moment.

THE COURT: All right.

MR. SHEA: Your Honor, while this is being looked at, may I make a suggestion? This is an excellent example of the kind of thing we have been objecting to. Now, Mr. Wright is suggesting to the jury -- and I don't know whether he will be able to prove his point -- that the Defense Department opposed this legislation. Quite obviously he is not establishing that by any testimony under oath, but only presents it on his own vouching to the jury. And I would like the jury to be reminded that this is something to which they should give no credence.

THE COURT: I think in a case of this type, Mr. Shea, that a certain amount of discretion must be left to the trial court as to the extent of the cross-examination of the witness. All right, you have made your point.

MR. GATES: Thank you, Your Honor (returning the letter to counsel for plaintiff).

(Letter August 20, 1952 from Wickes to Hays, was marked Plaintiff's Exhibit 116-B for identification.)

4294 BY MR. WRIGHT:

Q. I will show you, Mr. Wickes, this letter which has just been marked for identification as Plaintiff's Exhibit 116-B (handing to the witness), and I will ask you if you wrote that letter on or about the date it has there?

A. I believe I did.

Q. Now, that was the letter referred to, was it, in the letter from Mr. Hays to you which is in evidence here as 116-A, dated August 25th?

A. I believe so.

Q. Well, would you read it, please?

A. It is dated August 20, 1952, to --

"J. H. Hays, Esq., Counsel

"Association of Western Railroads

"280 Union Station

"Chicago, Illinois.

"Dear Joe:

"Your letter of August 14 about tentative statement on the transportation of dangerous explosives raises many questions in a field in which I am certainly no expert. I should think the reply to the Defense Department's statement would be much better coming from the A.A.A., and it may be that it would be willing to hear suggestions if we can set up a definite procedure.

4295 "As to procedure, I should think the Congressional Record approach would be best if that idea appeals to Mr. Mahon." M-a-h-o-n.

Q. Excuse me. Who was he?

A. I don't know.

Q. Go ahead.

A. (Resuming reading):

"It has the disadvantage that January is a long way off if no special session intervenes.

"As to Federal legislation, I have thought that we might shoot for a truck law limiting the weight of explosives to 5,000 or 10,000 pounds, and particularly limiting the distance. However, there is this to remember: If Congress undertakes legislation on all trucking of explosives on some theory or other, it may occupy the field. At present, the Interstate Commerce Commission has just canceled all its regulations on the intrastate trucking of explosives. Therefore, there is a current need for state re-evaluation on intrastate trucking. It may be that we could accomplish more through the individual states, because it would be unlikely that they would probably not be consistent with each other.

4296 "In any case, I entirely agree we should have an early meeting -- as soon in September as possible to avoid conflicts with vacations. I would suggest a relatively small first meeting of those of us who are most familiar with the subject primarily for the purpose of establishing a long-range coordinated program.

"Very truly yours,

"Lewin W. Wickes, Jr., Assistant General Solicitor."

Q. Do you recall, in the first paragraph there, that letter is apparently a response to another letter from Mr. Hays of August 14th, is it?

A. It mentions a letter of August 14, sir.

Q. Do you recall now what the substance of that letter of August 14 was? A. No, sir.

MR. WRIGHT: I might say, Your Honor, that letter is one that we have never been able to locate, so far as I know.

THE COURT: Does anyone know anything about that letter of August 14th?

MR. McGLOTHLIN: I don't know.

THE COURT: Very well. No one knows.

BY MR. WRIGHT:

Q. You don't have any recollection as to what Mr. Hays said in that letter?

4297 A. No, I don't sir. As a matter of fact, this letter and the two exhibits associated with it are what I thought, in my deposition here, to be telephone calls that preceded, I believe they preceded, this meeting in Washington. And my present recollection is blank. My recollection at this time is that that meeting had followed telephone conversations.

* * *

4302 THE DEPUTY CLERK: Plaintiff's Exhibits 127 and 127-A.

(Letter dated April 23, 1952, Hays to Defense Committee, was marked for identification as Plaintiff's Exhibit No. 127.)

(Attachment to above letter, headed Department of Defense Statement, was marked for identification as Plaintiff's Exhibit No. 127-A.)

* * *

4303 THE COURT: Only the first page, I think, is being offered at this time.

MR. WRIGHT: That is right.

MR. BALL: We will file our objections later.

THE COURT: The record will show that you have a right to file your objections.

* * *

4304 (Mr. Ball filed Objections of Defendants the Association of Western Railways and the Individual Western Railroad Defendants, as follows:)

"Plaintiff's Exhibit 128

"(Document No. 63)

"These defendants object to this exhibit as wholly irrelevant and immaterial, and as incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That this document relates to the issuance of repro-

4305 ductions of published matter appearing in newspapers and magazines and related to a subject of public concern, and this document relates therefore to the exercise of the rights of free speech and of the press guaranteed by the First Amendment.

"2. That this document relates solely to legislative and prospective legislative activities which were within the protection of the First Amendment."

* * *

4326 (The objections by Defendants Nos. (7), (81) and (88) to the Admission in Evidence of Plaintiff's Exhibit No. 129 are as follows:)

"The undersigned defendants object to the admission in evidence of Plaintiff's Exhibit No. 129 on the following grounds:

"1. It constitutes hearsay not coming within any exception to the hearsay rule, in that it consists of extrajudicial declarations not made by or on behalf of any of these defendants and not subject to the tests of cross examination and judicial oath.

4327 "2. It is not relevant to any issue material to plaintiff's case, in that there is no evidence or proffer of evidence indicating that the documents or the activities referred to therein had any connection with plaintiff or with public relations activities defamatory of plaintiff.

"3. There is no evidence or proffer of evidence indicating that the document or the activities referred to therein were in furtherance of the alleged conspiracy.

"4. Any additional grounds stated by other defendants.

"Signed: Francis M. Shea, Lawrence J. Latto,
Richard T. Conway,

"Attorney for Defendants Nos. (7), (81) and (88)."

"Objections by Defendants Nos. (7), (81) and (88) to the Admission in Evidence of Plaintiff's Exhibit No. 130.

"The undersigned defendants object to the admission in evidence of Plaintiff's Exhibit No. 130 on the following grounds:

"1. It constitutes hearsay not coming within any exception to the hearsay rule, in that it consists of an extrajudicial declaration not made by or on behalf any of these defendants and not subject to the tests of cross examination or judicial oath.

"2. It is not relevant to any issue material to plaintiff's case, in that there is no evidence or proffer of evidence indicating that the document or the activities referred to therein had any connection with plaintiff or with public relations activities defamatory of plaintiff.

4328 "3. There is no evidence or proffer of evidence indicating that the document or the activities referred to therein were in furtherance of the alleged conspiracy.

"4. Any additional grounds stated by other defendants.

"Signed: Francis M. Shea; Lawrence J. Latto; Richard T. Conway, Attorneys for Defendants Nos. (7), (81) and (88)."

"Objections by Defendants Nos. (7), (81) and (88) to the admission in evidence of Plaintiff's Exhibit No. 130-A:

"The undersigned defendants object to the admission in evidence of Plaintiff's Exhibit No. 130-A on the following grounds:

"1. It constitutes hearsay not coming within any exception to the hearsay rule, in that it consists of extra-
4329 judicial declarations not made by or on behalf of any of these defendants and not subject to the tests of cross examination and judicial oath.

"2. It is not relevant to any issue material to plaintiff's case, in that there is no evidence or proffer of evidence indicating that the documents or the activities referred to therein had any connection with plaintiff or with public relations activities defamatory of plaintiff.

"3. There is no evidence or proffer of evidence indicating that the document or the activities referred to therein were in furtherance of the alleged conspiracy.

"4. Any additional grounds stated by other defendants.

"Signed: Francis M. Shea; Lawrence J. Latto; Richard T. Conway, Attorney for Defendants Nos. (7), (81) and (88)."

"Objections by Defendants Nos. (7), (81) and (88) to the Admission in Evidence of Plaintiff's Exhibit No. 131:

"The undersigned defendants object to the admission in evidence of Plaintiff's Exhibit No. 131 on the following grounds:

4330 "1. It constitutes hearsay not coming within any exception to the hearsay rule, in that it consists of extra-judicial declarations not made by or on behalf of any of these defendants and not subject to the tests of cross examination or judicial oath.

"2. It is not relevant to any issue material to plaintiff's case, in that there is no evidence or proffer of evidence indicating that the document or the activities referred to therein had any connection with plaintiff or with public relations activities defamatory of plaintiff.

"3. There is no evidence or proffer of evidence indicating that the document or any of the activities referred to therein were in furtherance of the alleged conspiracy.

"4. Any additional grounds stated by other defendants.

"Signed: Francis M. Shea, Lawrence J. Latto, Richard T. Conway, Attorneys for Defendants Nos. (7), (81) and (88)."

* * *

4340 "Defendants 11 and 29 object to the admission into evidence of each of the following exhibits on the grounds that:

"1. The authenticity of the exhibit has not been established.

"2. The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

"3. The document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

4341 "4. The document is not a declaration in furtherance of any conspiracy.

"Plaintiffs exhibits to which the foregoing objections are made by these defendants are the following:

"125, 126, 128, 129, 130, 130-A, 131, 132, 132-A."

* * *

4352 "Defendants (11), (29), and (66), object to the admission into evidence of each of the following exhibits on the grounds that:

"1. The authenticity of the exhibit has not been established.

"2. The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

"3. The document is hearsay and is not an admission by

4353 any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

"4. The document is not a declaration in furtherance of any conspiracy.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

"105-A, 105-B, 105-C, and 105-D."

MR. SHEA: Has Mr. Wright indicated against whom these are being offered?

THE COURT: I cannot hear you, Mr. Shea.

MR. SHEA: Has Mr. Wright indicated against whom these are being offered?

MR. WRIGHT: These are being offered against all the railroad defendants in this case and also defendants in the Reparations case, on whose behalf the testimony was given in the Reparations case.

MR. SHEA: Now, your Honor, I would suppose that there was no basis on which the testimony of any proceeding --

THE COURT: Any testimony, what, Mr. Shea?

4354 MR. SHEA: I would suppose that there was no basis on which testimony in another proceeding involving different parties was admissible in this proceeding. I am not talking now about possible useful purposes of impeaching a witness, or something of that kind, but to introduce evidence in another case, where the issues are different, and where there has been no opportunity for cross-examination on the issues arising in this case, I would suppose was clearly objectionable and clearly not admissible; and this is material which has not been subject to cross-examination, and which is not introduced respecting the issues in the instant case.

I would therefore object on this score, and I, indeed, have no notion of what was in it. It was served on us this morning about five minutes ago, but I haven't had an opportunity to look at it.

THE COURT: All right, any further objections?

Mr. Ball.

MR. BALL: We object to the unnecessary burdening of the record by the introduction of this mass of testimony. If matters are going to be introduced into evidence, we assume that they are matters that are important enough that the jury should have them. This means another day and a half reading of matters that were involved in another piece of litigation, and we would like the right to spell out specific objections when we have had an examination of this, but specifically at this time we object to the burdening of this record and the time of this jury by something that cannot prove or disprove any issue in this case.

4355 THE COURT: Mr. Gates.

MR. GATES: Your Honor, I would like to introduce objection on a little different ground.

I certainly subscribe to everything that Mr. Shea and Mr. Ball said, but there are at least four or five parties to this proceeding who had no connection or participation in the Reparations case.

Now, this conspiracy that has been talked about is alleged to have involved rates which were cut in 1955, and here we are in a proceeding which started right after the War, in 1946, and testimony given when we had no opportunity to participate, and anticipating what is coming, and then they are going to seek to introduce this against all these other defendants; and I submit, Your Honor, that there is no basis that I can think of, and I think Mr. Wright ought to be asked to state for the record on what evidentiary theory this material is admissible in this proceeding.

Now, this came about, Your Honor, if you recall, by Mr. Wright wanting to test Mr. Wickes' knowledge of what he had in mind, what he knew about it at the time that certain press releases were issued.

Now, he comes along and offers it on a completely different basis, and I submit that that is error of the most grievous kind.

4356 THE COURT: Well, let's find out under what theory he wishes to offer it, the testimony of the four witnesses in the Reparations case. Mr. Wright.

MR. WRIGHT: In the first place, I think it is sufficient to say to Mr. Gates' remarks, that the evidence is not offered against his client, which happens to be an association, one of the associations which are in here because we claim they did what the railroads wanted them to do. They were agencies for carrying out railroad policy.

Now, this testimony that I have just marked here is offered against the defendant railroads in this case because they were parties to this proceeding, and they tender this testimony to the Interstate Commerce Commission, knowing exactly what it contained, because, as the witness has described it, it was what is known as canned testimony, testimony prepared in advance and you know exactly what the Director --

THE COURT: Well, let us find out about the record. Were all the railroad defendants parties to the Reparations hearing?

MR. WRIGHT: They were, and many others, because the Reparations defendants were all carriers of explosives.

THE COURT: I mean, all the defendants in this case.

MR. WRIGHT: Yes, sir.

4357 THE COURT: Railroad defendants.

MR. WRIGHT: Yes, railroad defendants.

THE COURT: Railroad defendants?

MR. WRIGHT: Yes.

MR. BALL: There was a statement made here that all of them were haulers of explosives. All of these defendants who were parties to the Reparations case, the explosives feature was only a small part. There are some of the defendants that I represent that have no basic interest in the explosives and were not involved in any substantial way in the explosives feature of the Reparations case.

* * *

CROSS-EXAMINATION OF MR. WICKES BY MR. McGLOTHLIN

4372 Q. Now, in connection with your work as assistant general solicitor, have you ever been consulted by the Traffic Department as to whether any railroad rate should be raised or lowered or left unchanged?

A. No, sir.

Q. Are you aware of the charges in this case that the Pennsylvania Railroad and other railroads raised rates on Government explosives in October 1955?

A. Yes, sir.

Q. When did you learn of that rate change?

A. I learned of the rate change at the time that I got some notice of the amendment of the complaint in this case. In other words, the amendment itself was the first knowledge that I had. That was in 1958, I think.

* * *

Q. Now, beyond January or February of 1954, beyond the time the oral argument in the Explosives case, do you recall further instances of participation in the preparation or approval of publicity material with Byoir?

4398 A. That is the last one I know of.

* * *

4433 Q. What else did you learn about truck operations?

A. There was testimony introduced, for example, by public witnesses, showing that trucks with explosives being driven by the trucking companies within a Government installation were escorted through the Government installation over the Government's private roads by armed guards, sometimes two cars, a Jeep preceding and a Jeep behind the truck, moving at limited speed.

4434 There would be speed limits down to say 15 miles an hour for a load of explosives. They would move -- the guards would accompany the trucks, according to these witnesses -- to the gates of the installation. The Jeeps would pull aside and this fellow would highball down the highway all by himself, going wherever he was going.

The testimony of the Government witnesses supporting, the traffic people supporting the so-called need for explosives, was that this was true, that they did take care of explosives within their own installations, but they didn't care much what happened to them from the time they left the origin to the time they got to the destination.

And then, in addition to that, there has been testimony here about moving pictures. I saw those moving pictures. I participated in the discussions relating to the taking of them. I knew how they were being taken, the instructions that had been given to the cameramen, and then I saw the moving pictures and heard the testimony of the cameramen relating to what they had seen, and the conditions under which the trucks operated are in sharp contrast, and the manner in which they operated are in sharp contrast, in my opinion, to what I had known about railway transportation of explosives.

4435 Q. Let me ask you a few questions about this motion picture film. You have seen it, I take it.

A. Yes, sir.

Q. Will you tell us whether the scenes in the motion picture film to which you referred were related to only the single trucker or, if not, to what truckers?

A. They did not. They related to -- well, they related specifically to truckers whose trucks the cameramen saw, and the ones that they happened to see were -- there was one applicant by the name of Hughes; there was a protestant in that case who was not an applicant, by the name of Baggett.

There were trucks of Riss & Company, because Riss was operating in the territory where they found trucks with explosives moving and they took pictures of those trucks too.

Q. For what purpose was the film prepared?

A. The film was prepared for the basic purpose of showing the conditions under which trucks move explosives by highway and --

Q. Showing where?

4436 A. Showing the Interstate Commerce Commission.

Q. In the proceeding?

A. In the proceeding.

The fundamental purpose was to show the general conditions, and a secondary purpose, a very real purpose, and a secondary purpose, was to show any violations that might be shown of any of the applicants in those proceedings.

Q. Now, as attorneys, what preparation, if any, was made for the submission of the films in evidence?

A. Mr. Cole was in charge of the presentation of the evidence, and Mr. Cole had been assigned to this case before I had, and Mr. Cole conducted considerable library research on the admissibility of films in evidence, how they are introduced in evidence, prepared his own notes and memoranda for presentation of an argument to that effect, or on these evidentiary points, and in addition to that, Mr. Cole and I discussed this

problem with a lawyer representing other parties in the proceedings who himself had introduced moving pictures and shown them to the Interstate Commerce Commission in the Interstate Commerce Commission proceedings, and subsequently had shown moving pictures to the Court on appeal from the Interstate Commerce Commission decision.

Q. Will you tell us what Interstate Commerce Commission proceeding that was, in which the films were admitted?

4437 A. According to Mr. McGlaughlin, who had been in that case, it was the Stoker case, which had occurred some time previously to these proceedings.

MR. WRIGHT: I didn't get the title.

THE WITNESS: Stoker -- S T O K E R (spelling).

MR. WRIGHT: Could we have it identified by number?

THE WITNESS: There is in our brief in Sub 84 a citation of that case.

MR. McGLOTHLIN: I will get it for you, Mr. Wright, at the recess.

MR. WRIGHT: Very well.

BY MR. MCGLOTHLIN:

Q. I take it the film was not actually received in evidence; is that correct?

A. That's right, sir.

Q. Was any part of it marked for identification?

A. One reel was marked for identification.

Q. Was the evidence -- Let me ask you this:

Does the evidence have what was contained in the film presented to the ICC?

A. Yes, sir, in great detail.

Q. Through whose testimony?

4438 A. Through the testimony of the cameramen who took the pictures. They had logs of the trips, what was going on, as well as the moving pictures

themselves, and they testified as to what they had seen exactly as though they had said, "Here, here is the moving pictures, and here is what I saw."

Q. I gather that at least some parts of the film indicated -- or some parts of this testimony indicated violations of State law and local ordinances; is that correct?

A. Yes, sir, they did.

Q. How was the existence and character of these local laws or State laws established?

A. The operations that had been photographed, the trucks that had been photographed were operating in Maryland and Pennsylvania, and a lawyer from Pennsylvania and a lawyer from Maryland was called as a witness to testify as to the local laws which would inform the Commission as to that situation, in order to compare the evidence as to exactly what was done in relation to local law.

They testified as to whether or not, in other words, there was a law, and whether or not there was a violation under certain circumstances.

* * *

4476 Q. Mr. Wickes, I believe you testified earlier that you prepared a draft of exceptions and arguments to court in connection with the exceptions to the Examiner's report, of truckers explosives cases, and submitted it to a gentleman in Massachusetts; is that correct?

A. Yes, sir. I sent a draft to Mr. Heaphey.

Q. Mr. Matthews Heaphey?

4477 A. Yes, sir.

Q. What was his position?

A. He was deputy attorney general or assistant attorney general of Massachusetts.

Q. These exceptions were along when? In the middle of '53, were they not?

A. Yes, sir.

Q. Prior to that time, at the hearings proper, had Massachusetts participated at all?

A. Yes, it had, represented by Frank Roche.

Q. And when was that?

A. At the hearings in Washington, in December or January, I would think. In the winter of 1951, Heaphy too.

Q. Was Mr. Roche still involved in the matter when the time came for exceptions to the Examiner's brief?

A. No, sir. There had been a change in administration and Mr. Roche was no longer connected with the office.

Q. Well, after the change in administration, did you see Mr. Heaphy?

A. Yes, sir.

Q. Where did you see him?

A. I met Mr. Heaphy in Boston.

Q. How did you introduce yourself?

A. As an attorney for the Pennsylvania Railroad.

Q. Did he ask you any questions?

4478 A. Well, the occasion for my call on him was a discussion of the situation of the record as it then stood, which the Examiner's report had been filed and a date for exceptions had been set.

Q. Was there any discussion of ICC procedures at all?

A. Yes, sir. Mr. Heaphy does not regularly practice before the Interstate Commerce Commission and we discussed the way in which these things are handled, the way in which exceptions are filed. Each commission has a little bit different arrangement. And we discussed the position of the rail carriers and of the State.

Q. What if any materials, as to what was in the record in the truckers explosives cases, did Mr. Heaphy have?

A. I know that I sent Massachusetts from time to time several parts of the record and I know that as of that time, of course, the Examiner's report had been filed and they were served as a party of record. Mr. Layne's brief which extensively abstracted the record had been sent, had been served on Massachusetts and was in Mr. Heaphy's files. The railroad brief which abstracted every word of the record, in a printed document about 700 pages long, was in his hands. That was very objective, just summary of what the witnesses said.

* * *

4500 Q. Now, let me turn to the proceeding that is called Sub 60-TA.

A. Yes, sir.

Q. That is technically the name of a temporary authority which Riss held, is it not?

A. That's right, sir.

Q. And a petition was filed by the Pennsylvania and certain other people for ICC action with respect to that authority, was it not?

A. Yes, sir.

Q. Now, when was that filed?

A. The petition was filed February 29th, 1952.

Q. Eight years ago today?

A. I guess it was.

Q. Now, what was the basis for the petition?

A. The basis for the petition was the position of the rail carriers that Riss was not operating according to the territory that had been granted in the Commission's grant of the temporary authority.

* * *

4504 Q. Now, it is in evidence here, I believe, that the Commission's cease and desist order actually came into effect some 18 months later.

How do you explain that lapse?

A. Mr. Layne filed petitions, he filed requests for extensions of time. He finally filed an appeal in the District Court in Kansas City. He litigated that appeal, and the Court decided against him, and he petitioned for a rehearing before the Court in Kansas City.

When that was denied, he appealed to the Supreme Court of the United States, and on a motion to affirm the intervening railroads finally got a final decision from the Supreme Court sustaining the Commission's position.

Q. You don't contend that Mr. Layne didn't have a perfect right to take all the appeals he wanted?

A. Of course, he had a right to appeal.

* * *

4541 INTRODUCTION OF PLAINTIFF'S EXHIBIT NO. 125

MR. BALL: (Reading): It is stipulated and agreed between the parties hereto that Plaintiff's Exhibit 125 for identification, consisting of 24 pages, is a true copy of the National Sheriff, Volume 5, No. 3, an issue of a magazine published by the National Sheriff's Association, 714 Transportation Building, Washington 6, D. C., on or about March 1, 1953, and that this magazine was circulated by the Association solely to the then approximately 12,000 members of that Association, all of them being sheriffs or peace officers in the United States.

REDIRECT EXAMINATION OF L. W. WICKES BY MR. WRIGHT

4570 Q. Is that film that you have there in front of you the film which is referred to in the correspondence with Strouse?

A. I have a letter here from Dick Strouse and that is the film that Mr. Strouse was referring to.

Q. Now, how many feet have you got of that film?

A. I don't know.

Q. Do you have any idea?

A. No, sir.

Q. I got the impression from one of your answers to Mr. McGlothlin's questions that that film was something that was just supposed to represent the movement of explosives trucks in a given area at a particular time, is that correct? Is that what you meant to convey?

A. That's correct.

Q. The fact is, isn't it, that that film was not taken by any cameraman who simply purported to photograph everything that occurred in a particular area at a particular time, was it?

4571 A. I don't think any cameraman could photograph everything that occurred in any area at any given time. It's impossible.

Q. Will you just answer the question.

A. I did.

MR. WRIGHT: Will you repeat the question.

I wasn't asking you about any other film; I was asking you about that film.

(The last question was read by the reporter.)

THE WITNESS: I answered it.

BY MR. WRIGHT:

Q. There is a useful word "No". The answer is No, isn't it?

MR. McGLOTHLIN: May we have the answer read that was actually given?

THE COURT: Suppose you read the answer to the question you read.

(The answer was read by the reporter, starting, "I don't think any cameraman could . . .")

BY MR. WRIGHT:

Q. Who gave the orders to the cameraman as to where he was to go and what he was to take?

A. Basil Cole.

4572 Q. Who was he?

A. He was an assistant solicitor in the Law Department of the Pennsylvania Railroad.

Q. He was assisting you, was he, in the trial of the explosives case?

A. We worked on it together.

Q. Now, in addition to a cameraman, there was a driver, was there not, who was assigned to work with him?

A. That's right.

Q. Do you know the names of those gentlemen?

A. There were two cameramen; one was William Wilson, one was a man whose last name was Spieler. And the driver was a man named Dominick Necastro who was an employee of the Pennsylvania Railroad with the job of car inspector.

* * *

4576 BY MR. WRIGHT:

Q. When that film was taken over to the Interstate Commerce Commission and you wanted to show it to the Examiner, you didn't attempt to show it, did you, without having the cameramen there who took it?

A. They were there.

Q. And you offered their testimony as to how they took it and what they did, did you not?

A. That is right.

Q. And they were subject to cross-examination then?

A. Yes, sir.

Q. You recall it to appear in the course of the cross-examination that one of them at least falsely represented himself as an ICC inspector at one point in connection with the film?

MR. BALL: Objection. It is not true and it is assumption of fact not in the record.

THE COURT: Do you have the record?

MR. WRIGHT: The record in the Sub 84 case is over here, yes.

THE COURT: Ask him, were you there at the time.

MR. WRIGHT: He was there at the time, I presume.

4577 THE COURT: Let me ask the witness a question. Were you there at the time this witness testified?

THE WITNESS: Yes, sir.

THE COURT: Do you know what he represented himself to be, I think the question is, at the time he took the pictures? Is that what you are trying to find out?

MR. WRIGHT: Yes.

BY MR. WRIGHT:

Q. It is a fact, isn't it, that he was trespassing on a parking lot and when the owner wanted to throw him off, he said he was from the ICC; isn't that correct?

MR. GATES: May the Court please, I object on the ground that Mr. Wright says is here what is the best evidence of what the witness testified.

THE COURT: If the witness was there and he said that did'n't happen, he can answer if he has any recollection about it.

All right.

THE WITNESS: I can tell Mr. Wright what occurred and it isn't what he says occurred.

THE COURT: Suppose you do.

4578 A. The testimony was not that the cameramen who were there to testify as to the facts, which they had taken pictures of and did describe in great detail in the record; not these people, as Mr. Wright would like to imply, but the, in effect, chauffeur, the driver of the automobile, who, I believe, had no reason to know the seriousness of what he did, did say to a parking lot owner that he was from the Interstate Commerce Commission.

BY MR. WRIGHT:

Q. This was your employee you are talking about, the Pennsylvania Railroad?

A. That is right, sir.

Q. And he was the man who was driving the cameramen, making it possible to take those pictures, was he not?

A. That is right.

* * */

4620 (Objections of Defendants to Plaintiff's Exhibit 136, as follows:)

"These defendants object to the admission of this document for all of the reasons stated with respect to Plaintiff's Exhibits 49, 50, 51, 66, 68, 79 and 85."

* * *

4625 Q. Now do you recall keeping Byoir informed during 1954 of further proceedings in the PUCO case?

4626 A. '54 there were no hearings of any kind. I probably told somebody in Byoir whatever I might have heard about it.

Q. Well, let me show you this letter, which purports to be a copy of a letter from you to Mr. Marine of Byoir, dated August 31, 1954, a copy to Mr. Horace Lyon, and ask you if you recognize that as a letter you wrote on or about that date?

A. Yes, sir. That is my signature.

MR. WRIGHT: I will ask to have this letter marked with the next plaintiff's number.

THE DEPUTY CLERK: Plaintiff's exhibit number 139 for identification.

* * *

4664 Q. Now, I want to go back and ask you about that letter there, 139. That is a letter from you, is it? A. Yes, sir.

Q. And would you read that again so we know where we are.

A. Well, this is the one on Pennsylvania Railroad Legal Department stationery dated August 31, 1954, addressed to Mr. Jim Marine, Carl Byoir & Associates, 10 East 40th Street, New York, New York, with a copy to Mr. Horace L. Lyon of Carl Byoir & Associates in Buffalo.

"Dear Jim::

"In Horace's absence and since you know the background, I am sending you copies of petition of Pennsylvania and New Jersey to intervene in P. U. C. O. v. Riss.

"Can you do anything with this to follow up? If you can:

"Bear in mind Riss is right about the effective date of the section of the regulations making state violations also Federal violations. But general statements in the petition are valuable.

"Also -- Ohio's statement at the pre-hearing conference that it intends to file a second amended complaint probably makes moot the petition to reconsider the order granting the motion to strike part of the first

4665 amended complaint.

"Yours truly,

"Lew."

BY MR. WRIGHT:

Q. Now, that letter referred, did it, to some new interventions in the P. U. C. O. complaint case?

A. I believe it does.

Q. And those were the interventions of the States of Indiana and Pennsylvania?

A. It says here in this letter, "petition of Pennsylvania and New Jersey to intervene."

Q. All right, excuse me, Pennsylvania and New Jersey, and that was the State of Pennsylvania, I take it, that is referred to there?

A. Yes, sir.

Q. Not the Pennsylvania Railroad?

A. That is right. Indiana didn't intervene until the proceedings were in progress. d

Q. And you still had not intervened yourself, that is, the Pennsylvania Railroad or any other railroad? A. No, sir.

Q. Now, do you recall how long that was before this suit was filed here?

A. August 31, 1954. It was a matter of a month, something like that.

* * *

4674 "OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

"Plaintiff's Exhibit 134

"These defendants object to this exhibit as irrelevant and immaterial, as hearsay, and as incompetent to prove or disprove any issue as to them, and for the following additional reasons:

"1. That this exhibit states the conclusions and opinions of the writer thereof.

"2. That this exhibit deals with decisions made through communications between attorneys and clients, and thus is incompetent to prove any issue in this case."

"OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

"Plaintiff's Exhibit 127

"These defendants object to this exhibit for the reason that said article is irrelevant, immaterial and incompetent, and for the following reasons:

"1. That said article constitutes hearsay.

"2. That plaintiff has admitted (Answers to Interrogatories

4675 202(18) and 208(14) that neither the National Sheriffs' Association nor Charles J. Hahn, editor of "The National Sheriff" and Executive Secretary, National Sheriffs' Association, was either a co-conspirator nor an agent of any defendant in performing acts in furtherance of the alleged conspiracy.

"3. That the publication of this article by the National Sheriffs' Association is not an action for which any defendant can be held legally responsible.

"4. That the publication of this article was an exercise of rights guaranteed by the First Amendment."

* * *

4693 MR. WRIGHT: I am offering these excerpts from the testimony of the expert witnesses in the Reparations case about which Mr. Wickes was questioned both by me and Mr. McGlothlin, for the purpose of showing exactly what their testimony he was talking about is. I think in some respects it may tend to contradict what he has said, but in others it amplifies and explains and is in any event essential to any weighing of

4694 the validity of what his testimony has been here, both on my examination and Mr. McGlothlin's examination.

MR. McGLOTHLIN: May I point out that is exactly the same purpose for which I just offered the film.

THE COURT: I understand. You are not offering the film to prove the fact, but after all, if they once see the film they accept it as a fact, I suppose.

MR. McGLOTHLIN: Exactly the same thing is true here.

THE COURT: Yes.

MR. WRIGHT: Well, I am following through here. We are offering this. Of course, we will subsequently offer it as proof of the facts stated.

MR. SHEA: You will offer this as proof of the facts stated?

MR. WRIGHT: What?

MR. SHEA: You will offer this as proof of the facts stated?

MR. WRIGHT: Yes, if you read the memorandum we submitted, that was precisely the purpose we had.

* * *

4701 THE COURT: All right, but first of all, let me make this statement:

Mr. Wright, before I can rule on the admissibility of this evidence I want you to restate your purpose.

I think I understand your purpose.

Let me see if I can summarize it:

As going to show the Defendants' knowledge regarding this so-called "expert testimony" which he helped to prepare, I think, and had introduced at the hearing; that the publications by the railroad -- you refer to the TIES Magazine article -- were false and misleading, and they were known to be so in view of the matters contained in this testimony.

That is another one of your contentions?

4702 MR. WRIGHT: That's right.

THE COURT: And that the facts stated in this testimony by these witnesses are in fact true and are competent to prove these facts under the theory of adoptive admission --

Those are the points you summarize in your memorandum, as I gather them; is that correct?

MR. WRIGHT: That's correct.

* * *

4709 THE COURT: Let me see if I can get your position straight:

You are contending, are you not, or you are trying to convince the jury, at least, that all this so-called publicity that was gotten up, and the manner in which it was put out to the public and publicized, did not give a true picture to the public with relation to the danger of transporting explosives and ammunition and so forth by railroad.

In other words, it more or less painted a picture that it was all right to transport by railroad because that was the real safe way to do it.

MR. WRIGHT: That's right.

THE COURT: Wait a minute.

But the danger came in transporting by these truckers.

That is what you are attempting to get over to the jury, as I understand the picture.

MR. WRIGHT: Yes, sir.

4710 THE COURT: In order to show the jury that the witness knew that this information that they were dissemanating to the public was false, you have a right to show what they knew and what they did at the Reparations hearing, to show that they had knowledge of the real danger of transporting by railroad, what could have happened, in other words, through these expert witnesses.

That is what you are trying to show, right?

MR. WRIGHT: Precisely, Your Honor.

THE COURT: Now, Mr. McGlothlin shakes his head, and he says "No."

I will listen to him in a minute.

MR. WRIGHT: I just want to complete this. There are other things, if I could, before --

THE COURT: Well, principally, that is the real thing you are trying to show in this case, isn't it?

MR. WRIGHT: Well, there is more:

The "could-happen" testimony was covered by these first two witnesses, and of course, the "could-happen" picture was the burden of the TIES release and some of the others, but I do have in Col. Miles' testimony, which is in 105-C, Col. Miles summarizes the actual experience with rail transportation, which is quite different and opposite.

4711 Here we are not now talking about what could happen, we are talking about the contrast between what did happen and what the railroads and the TIES release and other statements, Mr. Wickes' to the Times, press releases here and there, said in effect did not happen.

Now, here is a definite showing that these releases and articles were not merely presenting a false picture with respect to what might happen, but they were presenting a false picture with respect to what had happened, and I want to call attention to what Col. Miles contributed in that respect, and all I had marked for him was:

"Question: Will you please state your name, address, and rank?

"Answer: Francis Henry Miles, Jr., LaSalle Hotel, Chicago, Illinois, Colonel in the United States Army, Retired."

Then he has a couple of pages of his qualifications:

He is an undoubted expert on the hazards involved in transporting military ammunition and explosives, both by truck, rail, or any form at all.

Then he goes on to list -- and this is the part I wish to read. I won't read all of it because this is ten pages of selected answers, but I will try to summarize here.

This is in response to the question:

"Question: Did any serious explosions occur in the
4712 handling and transporting of explosives or ammunition during World War II other than the ones you have mentioned?

"Answer: Yes, there were many explosions both in the manufacturing and the handling and transporting of explosives and ammunition, both in this country and broad, during World War II.

"Question: Will you discuss in your own way a few of these explosions as they relate to railroad transportation of explosives or ammunition?"

Then he lists a number of explosions. One of them which you may recall was this Smithfield, North Carolina, truck explosion which was used in the TIES article as an illustration of a hazard that was, according to TIES, peculiar to the trucking of explosives.

Col. Miles used it here as indicating the kind of hazard that is implicit in rail transportation also; that is, an accident that you are involved in through no fault of the railroad.

It happened that the trucker in that case was involved in the accident because of no fault of his. Another car ran through a stop sign and ran into him.

4713 But I just want to call attention to some of the highlights because he gives the facts about Port Chicago which the witness dismissed as a ship explosion, and it appears quite clearly that the explosion occurred while ships were being loaded from rail cars, and rail cars actually exploded, and he goes on to conclude, after describing this Port Chicago explosion, where there was a frightful loss of life, mostly service personnel who were around or near the pier there:

He said:

> "Everyone within 1,000 feet of the explosion center was killed -- several hundred in all. Many more persons were injured."

And he concludes that:

> "Although certain risks were accepted at Port Chicago, the results of the explosion really showed that greater isolation and greater distance to main line railroad interchanges and inhabited towns is imperative.
>
> "Had the railroads been unfortunate enough to have had this explosion happen, or in fact a much smaller one happen, in one of their interchanges at Port Chicago, the results would have been disastrous indeed."

And far more disastrous than several hundred killed and several hundred injured.

> "Similar disasters happened abroad with calamitous loss of life and property. Only ceaseless vigilance and good

4714 fortune kept the railroads' record comparatively clean in this

respect.

Then he goes on and lists a series of explosions of various kinds arising out of handling the various types of depot, both rail handling and truck handling, and he goes into the accident of Tolar, New Mexico, which was one which involved actual transportation movement.

There was an attempt to justify some of these statements that have been made about rail transportation of explosives on the ground that the explosition doesn't count if the rail cars have come to rest prior to the time of the explosion.

But he cites a couple here, such as Tolar, New Mexico, and I will simply read that one as typical of one --

THE COURT: Let me ask you, against which defendants are you offering this testimony?

MR. WRIGHT: This testimony is being offered against all of the defendants here who were all defendants in the Reparations case, and all of whom proffered Col. Miles' testimony as well as those I have just read.

MR. AILES: That is not quite true, of course, Your Honor. There are a lot of Associations here --

MR. WRIGHT: The railroad defendants, I am talking about.

4715 MR. RHOADS: If Your Honor please, that is exactly the reason I objected to the expression "the defendants' before. We are a defendant here.

THE COURT: You don't mean in this case.

MR. WRIGHT: I misspoke myself. The railroad defendants here.

THE COURT: The railroad defendants.

MR. RHOADS: It becomes quite important, Your Honor.

THE COURT: I think you have got to establish, if you haven't already established, that these railroad defendants who were parties to the Reparations hearing, acquiesced and consented in this particular type of testimony being offered.

* * *

4725 "OBJECTIONS OF DEFENDANTS (11), (29) and (66)

"Defendants (11), (29) and (66) object to the admission into evidence of each of the following exhibits on the grounds that:

1. The authenticity of the exhibit has not been established.

2. The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

3. The document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

4. The document is not a declaration in furtherance of any conspiracy.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

"80, 134, 135, 136, 137, 139.

"James H. McGlothlin,

"Attorney for Defendants 11, 29 & 66.

* * *

4751 MR. McGLOTHLIN: There is one other matter -- related matter -- I would like to move to strike the exhibits introduced by the Plaintiff signed by, or attributed to, Mr. Wickes, and, in particular, Plaintiff's Exhibit 132.

THE COURT: What is 132?

MR. McGLOTHLIN: That is the document in which he forwarded the Chicago-Tribune editorial which was read at the close of Mr. Wright's initial examination.

4752 My basis is this, Your Honor: Those documents are obviously offered to prove an intent of the Pennsylvania Railroad, intent to drive Riss out of business, or monopolize transportation -- some intent.

It is now transparently clear, after seven days of testimony, that Mr. Wickes' intent cannot be transferred into an intent of the Pennsylvania Railroad. His position, his lack of status as officer, director, and managing agent, and, finally, the very significant incident in which he suggested that a particular course be followed, and he was flatly turned down, a course which I am sure Mr. Wright would have attacked if it had been followed, makes it plain that his intent cannot be fairly presented to this Jury as the intent of the Corporation.

THE COURT: I will overrule the motion and counsel, if they wish to do so, may file any written objections in connection with the admissibility of the document known as Plaintiff's Exhibit 105, A, B, C, and D.

"OBJECTIONS OF DEFENDANTS AND ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS.

4753 "Plaintiff's Exhibit 135.

"These defendants object to this exhibit for the reason that it is wholly irrelevant and immaterial, is hearsay, and is incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the documents constitute an exchange of correspondence between two departments of the United States Government, for which no defendant is responsible, and which correspondence has not been shown to have been brought to the attention of any defendant at any time having any significance in this case.

"2. That the documents contain expressions of opinion and conclusions of the writers thereof.

"3. That the statements in these documents and the inferences sought to be drawn therefrom cannot be tested by cross-examination and should not be permitted in evidence."

"OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANT:".

"Plaintiff's Exhibit 137.

"These defendants object to the admission of this document as immaterial and irrelevant, as hearsay, and as incompetent to prove any issue in this case as to these defendants, and for the further reasons:

4754 "1. That this is a letter between co-counsel relative to a litigated matter in which such counsel were involved.

"2. That this letter contains opinions and conclusions of the writer thereof.

"3. That this letter is not the best evidence of the facts therein recited."

* * *

4755 MR. WRIGHT: I shall read first from Exhibit 105-A which is the testimony given in the Government Reparations Case by Doctor George B. Kistiakowsky.

THE COURT: Will you spell that name for the Jury, please?

MR. WRIGHT: That's K-i-s-t-i-a-k-o-w-s-k-y.

"Direct Examination:

"Question (By Mr. Wickes) Will you state your name, address, and occupation, please?

"Answer: George B. Kistiakowsky, Chemistry Department, Harvard University, Cambridge, Massachusetts."

And then follows the statement of qualifications which --

THE COURT: Excuse me. Mr. Ball?

MR. BALL: Immediately following the passage that was read, Mr.

Kistiakowsky was asked some questions about the general nature of the testimony he was about to give, and summarized that which appears in the written statement, which, under the practice, was submitted, and I would like to have two very brief passages read, which I will be very happy to --

THE COURT: Suppose you read it, Mr. Wright.

MR. WRIGHT: The next question is:

4756 "Dr. Kistiakowsky, is it correct to say your testimony covers in some detail the characteristics of explosions and explosives, since that is basic to understanding the true nature of the commodities involved in these proceedings, from the standpoint of physical chemistry and chemical kinetics, showing the chemical reactions involved?

"Answer: Yes, it is."

MR. BALL: Then will you skip over to Page 9227?

THE COURT: All right.

MR. BALL: And the question -- starting with the question and answer at the bottom of the page.

MR. WRIGHT: "(By Mr. Wickes) What is the next subject with which your testimony deals, Dr. Kistiakowsky?

"I discussed some of the conditions which may produce explosions, such as fire and heat, and impact and friction, including the very important subject of sympathetic detonation. In all of this discussion, it must be remembered that as far as explosions are concerned, the chain is not stronger than its weakest link, and the most sensitive and hazardous item of the explosives, which are involved in any particular handling, may determine the danger point so far as the chances of experiencing an explosion of the entire lot is concerned. The corollary of this principle is, the violence of the whole explosion will be greatly increased by the presence of one or more elements in the group of explosives being handled together, if that element is one of the highly powerful explosives, such as Torpex or RDX, and so forth."

4757 MR. BALL: The next question and answer.

MR. WRIGHT: "Question: Finally, we ask you to illustrate these principles based upon typical testimony and exhibits of operating officials and employees of the railroads in these proceedings, which we called to your attention, did we not, Dr. Kistiakowsky?

"Answer: Yes. I commented from the viewpoint of a chemist of what we might expect if explosions were involved in fires, wrecks, accidents, and near accidents."

MR. BALL: I think that summarizes, you see, the purpose which leads up to the passage that Mr. Wright now proposes to read.

THE COURT: All right.

MR. WRIGHT: Then there is extensive testimony about his qualifications and the technical aspect of explosions.

The part I wish to call particular attention to was his conclusions over at Page 9279 where he gets through.

He is asked:

"Question: Please summarize your testimony with an expression of opinion as to the existence of risk in the transportation of explosives by the railroad.

4758 "Answer: From the general considerations with which my testimony has dealt, I am led to the conclusion that it is contrary to reason to deny the possibility of major catastrophies involving military ammunition and explosives while these are being transported by rail. That more serious tragedies have not occurred during the past war years must be attributed to careful handling by the railroad personnel, but even more so to pure luck."

That is all I had. If anyone else wants any of the cross or other Dr. Kistiakowsky's testimony --

MR. BALL: Will you read beginning at the second question asked before the bottom on Page 9285?

MR. WRIGHT: "Have you ever read the rules for the transportation of explosives by railroad -- the rules that are put out by the Bureau of Explosives?

"Answer: I have never read the complete set of rules.

"Question: Have you read part of it?

"Answer: I believe I read some parts of it during the war, because I had to know about them at that time. I haven't read them recently."

MR. BALL: Will you continue with the next question and answer?

4759 MR. WRIGHT: "In your opinion -- of course directing this question only to the parts of the rules that you read -- if a person properly carried out those rules, would it be safe to transport explosives?

"Answer: I believe if the rules could always be obeyed, and no untoward accidents happened, that the transportation of explosives would be safe in the sense that probability of an accident would be extremely low."

MR. BALL: Thank you.

MR. WRIGHT: Very well. The next exhibit I will read from is 105-B, which is the full testimony of Doctor John E. Burchard, and the direct examination begins with the statement by the witness:

"My name is John E. Burchard and I am Dean of Humanities of the Massachusetts Institute of Technology, Cambridge, Massachusetts."

Then there are several pages of history and qualifications, and he qualifies himself as an expert on the impact of explosions in devastation areas.

I think, while I did not indicate this, I should read the part at 9299 beginning with "Scope of Testimony," which gives an idea of the ground that he covered. This is headed "I. Scope of Testimony."

4760 "This testimony will provide an estimate of the amount of damages which might have resulted, during World War II from the detonation of military

explosives carried in cars on any one United States railroad as it might have occurred at various points in the United States located on the line of movement of military explosives. It will name other places where comparable damages might have been expected. It will reach conclusions that there are many locations in the United States on routes along which military explosives were moved during the war where a single explosion could have created damages measured in many millions of dollars. The procedure of the testimony will be, first, to describe the methods for measuring damage and other effects of explosion which were developed during the second world war and which form the basis for the estimates I shall present; next to show how this war experience can be applied to estimate the damage arising from incidents such as those under consideration; next to present estimates of damage for several specific and quite different types of locations in the United States and on the lines of movement of high explosives on railroads, showing in some detail how these estimates are arrived at; next to couple with these estimates a statement of a number of other areas which would have been subject to comparable damage; finally, to draw general conclusions from the foregoing."

4761 And then the testimony follows in those lines, and what I wanted to call particular attention to were the conclusions that were drawn which are stated on Page 9383.

This is the section headed "Conclusion," after he has described the installations he has visited and the methods that were used in determining the amount of damage from any given type of explosion.

This is at 9383, headed "Conclusion":

"There are many other types of installations which might have been analyzed with comparable results. Such great industrial complexes as exist on the Pennsylvania Railroad from Philadelphia all the way to New York; such great areas of glass shattering on the thousands of workers in such a plant as the Glenn Martin Plant outside of Baltimore; the catastrophic explosion of a train in the tunnel under the Jones and Laughlin

Steel Company plant in Pittsburgh, Pennsylvania which would have destroyed several open hearth furnaces each worth five million dollars; or in the tunnels under Washington, D. C., Baltimore, Maryland or Seattle, Washington with untold urban damage; the terrific disruption to freight movements with the
4762 enormously costly diversions necessitated by an explosion in such tunnels as the Hoosac on the Boston and Maine Railroad, or the Western Pacific Railroad Tunnel near Chilcoot Summit, California; the Santa Fe Railroad Tunnel near Nelson, Arizona; the Union Pacific Railroad Tunnel near Aspen, Wyoming; the five tunnels on the Southern Pacific Railroad between Ogden, Utah, and Sparks, Nevada; the Moffat Tunnel on the Denver and Rio Grande Railroad; or the inevitable destruction by explosion of such key bridges as that over the Hackensack River on the Erie Railroad, the Susquehanna on the Erie Railroad, the Hudson at Poughkeepsie on the New York, New Haven and Hartford Railroad, the Ohio at Benwood on the Baltimore and Ohio, the Susquehanna at Havre de Grace on the Baltimore and Ohio or at Perryville on the Pennsylvania, the long bridge over the Potomac at Washington, D.C. on the Pennsylvania, the A.H. Smith Memorial Bridge over the Hudson at Albany on the New York Central, the Martinez-Benicia Bridge in California on the Southern Pacific, or any of the great trans-Mississippi or trans-Missouri crossings; any of these incidents would have resulted in damages running into millions of dollars. Moreover an explosion within several hundred feet of an impor-
4763 tant interlock (such as Zoo, Philadelphia, Pennsylvania Railroad; Ashtabula, Ohio; Hammond, Indiana, New York Central Railroad; Grafton, Baltimore and Ohio; Penn Haven, Lehigh Valley Railroad) would certainly put it out of commission and thus demoralize important traffic through the area to involve

operating costs of large amounts.

"Let us recapitulate. We have examined in some detail eight areas, each of which was typical of a number of comparable areas, all on the lines of major explosive movements during World War II. We have mentioned a limited number of comparable areas. Based on scientific knowledge, war time experience, and fair appraisals of property values I have estimated the order of damages which might have been expected in each of these or in any of the comparable situations. These I may now summarize:

"I An important railroad yard $5,000,000 - $15,000,000."

They should have this is based on explosives of train loads of explosives.

MR. AILES: These are based on assumed explosions.

MR. WRIGHT: Yes. If the Court please, this is what could happen, not what did happen.

4764 "An important railroad yard - $5,000,000 - $15,000,000.

"II A congested urban residential area - $25,000,000 - $100,000,000.

"III A large urban plant complex - $30,000,000 - $45,000,000.

"A waterfront area - $8,000,000 - $31,000,000.

"A refinery of moderate size - $25,000,000 - $30,000,000.

"A city business district - $11,000,000 - $33,000,000.

"A rural plant - $18,000,000.

"A warehouse area - $10,000,000 - 30,000,000.

"Based on my war experience with explosion damage, the trips of inspection I have made in this country, and calculations similar to those just presented I am entirely convinced that there were hundreds of installations throughout the country and situated along lines of travel of major explosive movements where

explosions of the type described would have caused losses amounting to not less than $15,000,000 and extending up to $100,000,000 for a single incident."

That's all I have for --

THE COURT: Mr. Ailes?

MR. AILES: I have a suggestion. I think, since this is all based on assumption that the witness' summarization with respect to what kind of explosive load he is talking about should be read in the record.

4765 THE COURT: All right.

MR. AILES: He is talking about war time full trains.

THE COURT: Do you wish to read part of that?

MR. AILES: Mr. Wright can. It is Page 9318. The first full paragraph there states the assumption he made.

MR. WRIGHT: I'll read it.

MR. AILES: Go ahead.

MR. WRIGHT: "For most of the calculations I have used a charge of 20 cars thus amounting to 500 tons of high explosive. This many cars were frequently to be found on trains in all sections of the country. In the first two examples, principally to demonstrate the greater degree of disaster with a larger amount of explosive, I have also calculated for 1,250 tons of high explosive which could be carried in 25 to 50 cars depending upon the nature of the shipment. Thus when I speak of the explosion of 50 cars I am talking about 1250 tons of high explosive which might have been in 50 cars of bombs or 25 cars of bulk explosive or an
4766 appropriate combination of such loads; and my 20 cars examples involve 500 tons of explosive correspondingly disposed. The longer trains of explosives were carried over some lines and particularly in the industrial east."

MR. AILES: Your Honor, since this is out of context, I am sure Mr. Wright will agree that when he talks about "were carried," he is talking

about during World War II.

MR. WRIGHT: Yes. This is all purely hypothetical testimony, in any event, as to what might happen.

THE COURT: The Jury understands that.

MR. McGLOTHLIN: Your Honor, I would like to read about a page of the cross-examination by the Government,--

THE COURT: Very well.

MR. McGLOTHLIN: -- of Doctor Burchard. This commences on Page 9386, and immediately follows the figures Mr. Wright was reading as to assumed damage.

THE COURT: Has anybody stated the date of this testimony? Is that in the record?

MR. McGLOTHLIN: January 17, 1951, Your Honor.

THE COURT: Very well.

MR. AILES: Your Honor, we should state at the same time that the rates involved the rates charged during the war. This hearing was later, but all of this relates to the rates the railroads had charged under war conditions.

4767 THE COURT: Yes. That is your understanding, isn't it, Mr. Wright?

MR. WRIGHT: That's correct.

THE COURT: All right.

MR. McGLOTHLIN: This is the cross-examination by counsel for the United States of Doctor Burchard immediately following the passage which Mr. Wright read about the amount of damage that might have occurred.

> "Question: Dr. Burchard, in your statement, and exhibit here, am I correct in saying you are only talking about TNT explosion?
>
> "Answer: That is correct.
>
> "Question: And you think you have made a study of these various several localities, and you think in your opinion this amount of damage would result?

"Answer: Right.

"Question: What figures have you used for the computation of your damages? Where did you arrive at the figures for window panes, let's say, and for buildings?

"Answer: Do you mean the dollar figures?

"Question: Yes, the dollar figure.

"Answer: I used a great many sources as I indicated in the testimony on pages to which I could refer.

4768 "Question: Yes.

"Answer: I don't know how I can elaborate on that. I can on any given example, go through and indicate the precise value.

"Question: Did you use present-day values or values during the war?

"Answer: Values certainly not later than the time when the incident would have occurred -- that is 1942."

THE COURT: All right. You may proceed.

MR. WRIGHT: The next testimony is that of Colonel Miles, which is in Exhibit 105-C, and that commences with the question by Mr. Burgess.

THE COURT: Who is Mr. Burgess, by the way?

MR. WRIGHT: Mr. Burgess, I believe, according to the copy of the briefs I have, is Mr. Kenneth F. Burgess, who, I think, is a partner of Mr. Ball.

THE COURT: Is he one of your partners?

MR. BALL: Yes, Mr. Burgess is a partner of mine, and Mr. Thomas' name is also mentioned, and is also a partner of mine.

THE COURT: I remember now. It is on the letterhead. I should have remembered that. All right.

4769 MR. WRIGHT: The first question by Mr. Burgess:

"Will you please state your name, address and rank?

"Answer: Francis Henry Miles, Jr., LaSalle Hotel, Chicago, Illinois. I am a Colonel, United States Army, retired."

There are then several pages of qualifications.

MR. McGLOTHLIN: Would Mr. Wright read the question starting at the bottom of 9397, "What official positions did you hold --" and read down through that answer?

MR. WRIGHT: "Question: Were your duties connected with the handling of explosives and ammunition prior to your retirement from the Army?

"Answer: Yes. I served in various capacities in the Ammunition and Explosives Section of the Ordnance Department of the United States Army continuously from 1912 to the time of my retirement from the Army in 1948, or more than 37 years in all.

"Question: What official positions did you hold during World War II with respect to explosives and ammunition?

"Answer: When the Safety and Security Office was established by the Chief of Ordnance, United States Army, in the summer of 1942, I was made the first Director of Safety and held that post
4770 until December 4, 1943. One of the principal tasks of the Safety and Security Office was preparation and publication of safety manuals governing the manufacture, storage, loading and handling of military explosives and ammunition.

"It was necessary to constantly revise these safety publications, in order to try to keep up with technological developments and increasing experience. We also established a disaster investigation program in an attempt to determine the cause of the disastrous behavior of explosives and ammunition. I was also President of the Army-Navy Explosives Safety Board from

September 1942 to the time of my retirement from the Army on January 1, 1948. That Board had the responsibility, among other things, for advising the Secretaries of War and Navy and more recently the Secretaries of the Army, Navy and Air Force of unusual hazards arising from the manufacture, distribution and use of military explosives, and of the methods of minimizing those hazards, where possible, through safety and control methods."

MR. AILES: Would you read the next question and answer too, Mr. Wright?

MR. WRIGHT: "Will you testify as to the general operation
4771 of the Safety and Security Division of the Ordnance Department and the Army-Navy Explosives Safety Board, both of which you headed, with particular reference to the transportation of ammunition and explosives?

"Answer: The Safety and Security Division of the Ordnance Department of the Army reported to the Chief of Ordnance directly and its controls were not subject to veto by the operating people.

"The Division could stop operation or shut down plants manufacturing ammunition or explosives and its jurisdiction extended to wherever ordnance work was performed. Civilian and government plants alike were subject to its control. The duties and responsibilities of the organization reached into the transport field and the protection of Government property in transit, any such action being taken usually, however, through the Bureau of Explosives of the American Association of Railroads.

"Such a comprehensive and effective control needed a strong Chief of Ordnance. Such an individual was General L.H. Campbell, Chief of Army Ordnance. The Army-Navy Explosives Safety Board had the duty to advise the Secretaries of

War and Navy of hazards. The Board also could operate separ-
4772 ately and distinctly from the operating agencies of the War and Navy Departments. Having direct contact with the Secretaries, the Board's power to correct explosives' safety deficiencies was very great.

"The Ordnance Department's ammunition inspectors were required to submit reports to the Office of the Chief of Ordnance covering explosions, receipt of damaged items, dangerous conditions, etc. Copies of many of these reports were forwarded to the Army-Navy Explosives Safety Board, thus enabling both organizations to perform their duties more effectively.

"In their work all safety organizations of the military agencies of the Federal Government had the finest kind of cooperation from the railroads and other transportation agencies and at considerable cost to them."

MR. McGLOTHLIN: I would like to have the passage read starting with the last question on 9400. I will read it, or Mr. Wright can.

THE COURT: Whichever way -- it doesn't make any difference. You may read it.

MR. McGLOTHLIN: "Question: What was the situation in this country about December 7, 1941 with respect to the facilities for transporting ammunition and explosives and for loading
4773 those materials into vessels for shipment abroad?

"Answer: At the outset of the war this country faced the necessity of putting troops into the field and supplying them and our allies with the required materiel of war. A primary requirement was the manufacture, handling and shipping of large quantities of explosives and ammunition. As stated in the Army Field Manual:

'Ammunition is the very life blood of modern warfare.

> Ammunition in the combat zone is made from strategic materials to exacting standards, costs more and weighs more than any other class of war supplies, is transported over great distances and is handled many times. It therefore represents an enormous expenditure of the resources of the nation. Its handling, storage, and use involve many considerations of safety. Its proper maintenance in storage necessitates constant vigilance. Finally, the various losses which may result from shortages or malfunctions of ammunition can prove more costly than those for any other war commodity.' (Field Manual 9-20 'Ammunition Supply Installations and Organizations' (November 1945), page 3)"

Continuing with the testimony:

4774 "The fact that in a single month of World War II the nation produced as much ammunition and explosives as in the entire period of World War I shows the magnitude of the task.

"Everybody concerned realized that it was dangerous to handle and transport explosives and ammunition, especially in and through concentrated areas of population. Handling of those commodities has always been a ticklish proposition and requires ideal conditions. While we never had ideal conditions during the war, the situation at the outset of the war was particularly bad. We had to accept the situation as we found it and take risks. Otherwise the necessary explosives and ammunition could not have been available for the use of our troops and our allies.

"The situation at both the rail transfer points and the ports was far from satisfactory. We had to use what we had for the time being and to plan for substitute facilities to reduce the hazard as soon as practical.

"While it would have been desirable to have lessened

the risks at once at many installations, it was not possible to do so, and risks had to be taken for a while, particularly in the earlier part of the war. As the war progressed and new instal-
4775 lations came into the picture, it was possible to discontinue use of some of the most hazardous facilities.

"Question: Is transportation of ammunition and explosives during wartime attended with more hazard or less hazard than in time of peace?

"Answer: It is always attended with greater hazard in wartime and this was especially true as to World War II.

"Question: What are some of the reasons for your statement?

"Answer: In the first place, the volume to be handled was far greater and emergency movements often were necessary. The concentration of explosives and ammunition involved in the movements of special trains of military explosives illustrate only some of the wartime problems in this regard.

"As complainant's witness William P. Brannan showed, it was not unusual for such special trains to carry more than fifty cars of explosives. All of these instances of increased volume, concentrations and emergency movements substantially increased the chances of accidents. The types of explosives and their characteristics change, and the advent of war brings in technical problems which in peacetime are handled without great
4776 difficulty.

"In wartime these technical difficulties, because of lack of information concerning them, bring about increased hazard. Many more sensitive explosives are put into use in wartime without adequate knowledge in detail as to how to handle them. Safety developments sometimes did not take place until months after the technological developments to make explosives more

sensitive and more destructive had occurred.

"Efforts to apply the highest standards of safety in handling explosives were often handicapped by lack of knowledge about the exact type of explosive involved. This was particularly true when information as to exactly what type was being carried was not given to those required to transport explosives. During the war some safety standards necessarily had to be relaxed, partly because of the volume of the ammunition and explosives, but more especially because they had to be transported on deadline schedules to the troops for use against the enemy at all costs. The very large volume of military explosives manufactured and transported during the war added to the difficulties presented by wartime conditions in securing trained personnel to handle ammunition and explosives.

4777 "Oftentimes, such handling during the war necessarily had to be entrusted to personnel without the training which would be regarded as standard in peacetime. The threat of sabotage and the threat of enemy bombing must be considered in relation to the transport of ammunition and explosives and in particular to the policing and protection of transfer points where transfers of ammunition and explosives take place.

"Mere rigid inspection was required by army personnel during wartime because we never knew when sabotage might be attempted. Even after the cessation of hostilities, more than a third of the tonnage of explosives which had been shipped overseas was returned from overseas theaters. These returned shipments often presented unusual dangers because of conditions resulting from prior handling and deterioration."

That is all I have.

MR. WRIGHT: I wanted to go then to Page 9411 beginning with the question:

"Did any serious explosions occur in the handling and transporting of explosives or ammunition during World War II other than the ones you have mentioned?

"Answer: Yes, there were many explosions both in the manufacturing and the handling and transporting of explosives and ammunition, both in this country and abroad, during
4778 World War II.

"Question: Will you discuss in your own way a few of these explosions as they relate to railroad transportation of explosives or ammunition?"

If the Court please, I would like to have Mr. Brody read for a while.

THE COURT: You may.

MR. BRODY: I will read the question:

"Will you discuss in your own way a few of these explosions as they relate to railroad transportation of explosives or ammunition?

"Answer: Port Chicago, California:

"The first explosion which I will discuss occurred at Port Chicago, California on July 17, 1944. Two naval cargo vessels were loading ammunition. The ammunition was located on ship, on the pier and in railroad cars on the pier sidings and adjacent to the pier.

"The ammunition located on ship and on pier had been transported there by the railroads and was still in the same condition when it exploded. In fact at the time of the explosion loading operations from freight car to ship were in progress. The town of Port Chicago and the Western Pacific, Southern Pacific and Santa Fe railroad interchanges were located
4779 about 3,000 feet from the vessels.

"Everyone within 1,000 feet of the explosion center

was killed -- several hundred in all. Many more persons were injured, three hundred twenty by flying glass, fifteen being totally or partially blinded. No one beyond 1,000 feet was killed.

"Complete demolition took place up to 1,100 feet from the center of the explosion and partial demolition, but beyond repair, at 4,600 feet. Minor damage was reported as far as twenty-five miles. People were thrown to the ground at 6 miles. Freight cars behind barricades were dished in at 1,500 feet.

"The pier facilities not yet completed were the only ones in the country where an explosion of Port Chicago violence could have taken place and have had the killed restricted to service personnel.

"Although certain risks were accepted at Port Chicago, the results of the explosion really showed that greater isolation and greater distance to main line railroad interchanges and inhabited towns is imperative.

"Had the railroads been unfortunate enough to have had this explosion happen, or in fact a much smaller one happen, in one of their interchanges at Port Chicago, the result would have been disastrous indeed. Similar disasters happened abroad with
4780 calamitous loss of life and property. Only ceaseless vigilance and good fortune kept the railroads' record comparatively clean in this respect in America.

"Hastings, Nebraska:

"Next I will discuss the explosion at Naval Ammunition Depot, Hastings, Nebraska on September 15, 1944. The explosion of seven hundred and nineteen tons of ammunition containing five hundred and fifty tons of high explosives on a loading platform and in freight cars standing at the platform or adjacent thereto completely destroyed the transfer depot, a reinforced concrete structure 500' x 60' (roughly), and its surrounding earth barricades 950' long x 75' at base by

20' high. Three railroad tracks ran along side of building within the barricades. A road along the other side of the building within the barricade gave truck accommodation.

"The explosion was caused by careless handling of bombs into a freight car. A bomb was allowed to strike a freight car door. Eight minutes after the initial explosion which was followed by fire the entire facility blew up. Ten men were killed, nine within the barricades, one at a distance of 600 feet from
4781 the nearest part of the explosion.

"Large fragments of freight cars, structural steel and concrete were thrown great distances, several of over five hundred pounds were thrown a mile, one large piece of concrete going 7,300 feet.

"Yorktown, Virginia:

"The explosion at the Naval Ammunition Depot at Yorktown, Virginia, on November 16, 1943 shows the constant danger from rough handling of ammunition. This explosion at the Naval Ammunition Depot at Yorktown, Va., occurred at 10:30 A.M. EWT --"

MR. BALL: Eastern War Time.

MR. BRODY: "Eastern War time, and involved 104,000 lbs. of high explosive.

"The warehouse of Filling Plant #2 was being served by four flat cars loaded with explosives. The first explosion took place in the north end of the building where the explosives were being handled. The explosion caused fire which caused progressive explosions at the south end of the building and on the flat cars and trucks serving the building.

"The cause of the explosions probably was faulty handling of loaded ammunition. Seven people were killed, seven injured. The building along with several others was destroyed.

Many minor injuries occurred and many buildings were damaged.

4782 "Grand Junction, Colorado:

"An explosion took place at Grand Junction, Colorado, on June 27, 1943. This explosion took place on the D&RGW Railroad and resulted from a hotbox which caused the car to take fire. The car contained fixed ammunition for cannon with explosive projectiles and was located about 200 feet from the railroad station at Grand Junction when it exploded.

"Four people were injured by flying missiles. Besides indicating the hazard from hotboxes in trains carrying ammunition, this explosion illustrates the delay which can occur in reestablishing traffic for it took six hours in this instance and twenty freight trains and three passenger trains were held up for this period.

"Ravenna, Ohio:

"On March 24, 1943, an explosion took place at Portage Ordnance Depot, Ravenna, Ohio. This explosion took place during the transfer of 20 lb. fragmentation bombs from magazine to truck. These fragmentation bombs were placed in clusters for transportation and handling and had a fuse which under certain circumstances wo uld function from shock when faultily assembled.

4783 "Tests made later indicated that faulty fuze might well have caused the explosion when one cluster was dropped or roughly handled. Some 41,000 lbs. of explosive in the bombs were involved. Fragments were thrown up to one mile -- a 500 lb. part of a stacking machine was thrown over a mile. Eleven people were killed, three injured. This is the same kind of ammunition which moved by rail from this important Depot and such faulty fuze could easily, in my opinion, have resulted in premature explosions during transit aboard railroad cars due to shifting of load, colision or rough handling.

"Tolar, New Mexico:

"I have already mentioned briefly the explosion on the Sante Fe line near Tolar, New Mexico, on November 30, 1944. Shipment of 500 lb. bombs from Amarillo, Texas to Benecia, California was made in an eighty-one car train.

"The seventh car of the train containing fuel oil derailed and was followed by the derailment of thirty-six other cars, including two cars of gasoline and the car containing the 500 lb. bombs. The gasoline took fire and the fire spread to the car containing the bombs. The bombs exploded. The derailment was caused when a journal box of a car containing fuel oil burned off due to a hotbox.

4784 "The broken journal punctured the tank and ignited the car of fuel oil. About 30,000 lbs. of explosives were involved. One person was killed, six seriously injured. Fortunately the explosion occurred in a sparsely settled area. All 37 cars were completely demolished.

"Joliet, Illinois:

"A very serious explosion occurred on June 5, 1942, at the Elwood Ordnance Plant in Building No. 2 designed for the drilling, boostering and shipping of 155 m/m shells.

"Anti-tank mines and fuzes were being packed in boxes and loaded into railway cars at the time of the explosion. Along one side of the building five railroad cars were spotted. Two of these were loaded to capacity with anti-tank mines. The third was nearly full. A fourth car contained only a few hundred mines, another car contained packing materials only. Apparently the fuzes being handled out of one bay of the building exploded first, representing about 2,500 lbs. of tetryl. The three railway cars, the two fully loaded and one almost fully loaded, exploded two seconds later. These railway cars con-

tained about 11,000 to 12,000 mines and fuzes, 57,000 pounds of TNT and 1,600 pounds of tetryl.

4785 "The fourth railway car, which contained only a few mines, did not explode, although it was badly damaged by the explosion in the other cars. The number of identified dead and missing was 48 and 46 were injured. Glass damage was reported at fifteen miles.

"The cause of the explosion was undoubtedly a malfunctioning of one of the mine fuzes which was probably roughly handled.

"McAlester, Oklahoma:"

THE COURT: Excuse me. I think we will take our morning recess.

(Objections filed as follows:)

"OBJECTIONS OF DEFENDANTS

"Defendants 11, 29 & 66 object to the admission into evidence of each of the following exhibits on the grounds that:

"1. The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

"2. The document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

4786 "3. The document is not a declaration in furtherance of any conspiracy.

"4. The documents, being testimony in a different case involving different issues, is wholly incompetent and inadmissible.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following: :

"105-A, 105-B, 105-C, and 105-D."

* * *

4787 "An explosion occurred on December 6, 1944 at the McAlester Naval Ammunition Depot when torpedo warheads were being loaded into an igloo magazine from low bed trailers. Eleven people were killed and the building was completely demolished. The cause is believed to have been the dropping or bumping in handling of the loaded warheads.

"Savanna, Illinois:

"This explosion on January 21, 1948 shows the ever present danger and could well have happened during railroad transportation. It involved approximately 290,000 lbs. of tetrytol in anti-tank mines located in a standard 60 ft. igloo type earth covered magazine. This magazine was located at some 1,925 feet from the Chicago, Burlington and Quincy Railroad and had the C B & Q passenger train that was at Galena Junction at the time of the explosion been passing adjacent to the exploding building the train would have suffered heavy damage.

"The magazine concerned was completely destroyed and numerous other buildings on the Savanna Ordnance Depot were damaged. This explosion took place at 8:46 P. M. Had it occurred during the school hours children in a school located at 6,200 feet from the explosion would have suffered severe in-
4788 juries from flying glass.

"Monroeville, Ohio:

"On July 19, 1943, an explosion took place on the Wheeling and Lake Erie Railroad near Monroeville, Ohio. The train was on a down grade when there was a heavy drag on the engine and twelve to fourteen cars piled up followed by fire. The only car of ammunition in the group, that being shells for cannon with explosive projectiles, took fire and the ammunition exploded. Fortunately this accident happened in open country and while one tramp was killed and another badly injured no other fatalities or injuries occurred. This explosion illustrates the especial danger from wrecks when trains carrying ammunition are traveling on grades.

"Smithfield, North Carolina:

"The serious explosion near Smithfield, North Carolina on March 7, 1942 illustrates the constant hazard of fire and explosion resulting from a

collision, an ever present danger in all forms of transportation. In that case there was a collision between a passenger automobile and tractor-semi-trailer carrying high explosives, followed by fire and explosion. The explosives being transported by the carrier were bursters loaded with approximately 4/10 lbs. of tetryl and TNT each, resulting in a concentration of 5,600 lbs. of tetryl and 2,400 lbs. of TNT.

4789 "Seven people were killed, forty people were injured and property damage resulting from the explosion and fires was estimated to be from $250,000 to $500,000. The crater blown in the highway by the explosion measured 40 to 50 feet wide and 25 to 30 feet deep.

"Norfolk, Virginia:

"The explosion which took place at the Norfolk Naval Air Station on September 17, 1943, shows how a fairly simple incident can often cause an explosion in transportation in spite of the fact that the same type of material might undergo even rougher handling at other times without any adverse consequences.

"Four trailers, each carrying six bombs were being towed from one storage to another through the inhabited portion of the Naval Air Station. One of the bombs fell off a trailer and was dragged a few feet. The friction from dragging the metal bomb on the concrete road generated enough heat to cause the explosion of the bomb, which in turn caused the remaining bombs on the four trailers to explode.

"The total explosives involved was 6,048 lbs. Twenty-four persons were killed and some 250 others were injured. The blast was felt 20 miles from the scene and windows were smashed and pictures fell from the walls in a 10-mile area. Severe structural damage occurred at 700 feet.

4790 "Metuchen, New Jersey:

"The explosion which occurred at Metuchen, New Jersey, on November 9, 1943 involved some of the foreign ammunition which was brought back to this country in substantial amounts during parts of the war period. A steel freight car was being loaded with 155 m/m French cartridge cases. The ammunition was being handled from the warehouse to the car. One end of the car

had been completely loaded when the explosion took place. The explosion progressed from the freight car to the warehouse where 90 m/m complete rounds in addition to the 155 m/m French ammunition caught fire and exploded. The fire was communicated to a wooden freight car and a steel freight car adjacent loaded with 90 m/m French anti-aircraft complete rounds.

"Detonations occurred for three hours and the fire lasted eleven hours. Fragments were thrown 2,000 feet. The probable cause of the accident was a protruding primer of one of the 155 m/m French cartridge cases.

"South Amboy, New Jersey:

"The most recent of the large explosions occurring during the transportation of explosives is that which occurred on May 19, 1950 at South Amboy, New Jersey.

"That explosion is largely a matter of common knowledge but I am personally acquainted with the scene of the explosion and have verified the following statements about it.

"Ten boxcars of anti-tank and anti-personnel mines and two box-
4791 cars of dynamite were being loaded into four barges for later movement to ship for overseas transportation and exploded during the process. Many people were killed and many more injured and the property damage ran into millions of dollars.

"The South Amboy explosion confirms once again what all of us know is the fact, that explosives often explode during their transportation and handling in spite of all precautions and that safety measures have been unable to eliminate the inherent hazards involved. The damage at South Amboy, as serious as it was, was substantially restricted, in my judgment, by the terrain at South Amboy and by the fortunate fact that much of the explosive material was at or below the surface of the water when it exploded."

That is all we plan to read.

THE COURT: Mr. Ailes, do you desire to read another part?

MR. AILES: Colonel Miles finished his direct testimony and was cross examined by Mr. Charuhas. I am reading from page 9427.

"Question. Your job was to see safety precautions were taken care of during all that procedure, wasn't it?

"Answer. No, I think the American Association of Railroads Bureau of Explosives had the primary responsibility there, but we cooperated with the Bureau in the effort to get a reasonable and satisfactory way
4792 of transporting these explosives.

"Question. You mean that you just listened to anything the Bureau of Explosives said to you, without conducting any research of your own, or making any decisions as to packaging, and so forth?

"Answer. Most of the stipulations of the Bureau of Explosives were very reasonable, and could be accepted by most people without any research. They had been established over a long period of time by due research on the part of the Bureau of Explosives, and by the explosives industry as a whole, and it wasn't necessary, in most instances, to do any research in connection with the stipulations of the Bureau of Explosives.

"Question. You were satisfied the safety requirements, as promulgated by the Bureau of Explosives, were very highly satisfactory, that if everything was carried out, there would be no danger of any explosions or mishap during transportation; isn't that true?

"Answer. I couldn't say that, sir, because explosions do occur, and they happen because of the innate character, inherent characteristics of explosives. The Bureau of Explosives does everything humanly possible to make for the least number of such explosions, but the inherent characteristics of explosives are such that no regulations can insure that there are not going to be explosions, in the transporting of explosives.

4793 "Question. But your work towards safety -- didn't you attempt to improve the conditions that might result in the explosion of ammunition during transportation?

"Answer. Yes, we did, we did very extensive tests, to determine what happens, explosives in transport.

"Question. You made extensive tests, but did you make any rules?

"Answer. I don't think we were able to improve very greatly because

of the characteristics of rails and rolling stock, and things of that character.

"Question. Are you familiar with the vast -- did you finish answering? I am sorry.

"Answer. We tended to prove what the Bureau of Explosives had demanded prior to these tests, and confirm them." That is all.

THE COURT: Mr. McGlothlin.

MR. McGLOTHLIN: I have a portion of further cross-examination I would like to read.

THE COURT: Very well.

MR. McGLOTHLIN: Colonel Miles was continuing to be cross-examined by counsel for the United States. This is on page 9436.

MR. BALL: There is an earlier passage, Mr. McGlothlin, that I would like to have read on page 9429.

4794 THE COURT: Very well, Mr. Ball. It is your turn.

MR. BALL: This is on page 9429, the second question from the bottom of the page.

"Question. Have improvements been made, let's say, since 1905?

"Answer. Yes, I think as a result of the activities of the Bureau of Explosives, under Colonel Beverly W. Dunn, that a considerable number of improvements were made, as the result of experience.

"Question. Now, how about as a result of the efforts of the office which you were in charge of, and your predecessors? Have any improvements come out of their efforts?

"Answer. Incidentally, I think, but all of them have been cleared through the Bureau of Explosives by consultation or by letter, and the Bureau of Explosives has put into effect the regulations, when recommendations in that respect have been made.

"Question. Isn't it true that explosives -- the transportation of explosives has progressively become safer, during the past 35 or 40 years?

"Answer. I think during the period that Colonel Dunn was the head of --

"Question. During the past 35 or 40 years, I am not talking about Colonel Dunn.

"Answer. In the sense that all technical matters improve, it can
4795 be said there have been improvements made, yes."

That is all. One more.

"Question. Would you say it was safer to transport explosives during the war years, 1941 through 1945, as compared with the previous ten years, before 1940?

"Answer. I would say it was much more difficult, much more dangerous to transport the volume of explosives that had to be transported during World War II than it was in preceding years. Also, the types of explosives transported had become intrinsically more sensitive and more dangerous to handle."

THE COURT: Mr. McGlothlin.

MR. McGLOTHLIN: I have a passage on 9436, Your Honor, starting with the second question on the page.

"Question. Well, can you think of any example, where coupled cars did not explode enmasse?

"Answer. Yes. I have seen cars in accidents where adjacent cars have not exploded when the car next to it has exploded, probably for the reason that the amount of explosives in the car which exploded was not great enough to transmit to the adjacent car.

"Question. Then, Colonel, your statement in here is not exactly true, is it? You say 'tests on freight cars show coupled cars will explode enmasse.'

"Answer. They will explode enmasse. They don't always do
4796 so. May I change it to that extent?

"Question. Oh, you can change it, yes sir. How do you wish to change it?

"Answer. They don't always explode."

Then I have a passage, if Your Honor please, which relates under cross-examination to the list of accidents which was in the portion read by Mr. Brody, and this is on cross-examination again by the United States of Colonel Miles.

THE COURT: All right.

MR. McGLOTHLIN: I am starting with the first question on page 9437.

"Question. (By Mr. Charuhas) Turning on page 19, where you discuss the explosion at Port Chicago, California, what commodity was involved there?

"Answer. A lot of navy material, bombs and depth charges, and various things of that kind.

"Question. Containing what type of explosive?

"Answer. Containing torpex, principally.

"Question. Is it your understanding torpex is involved in this complaint?

"Answer. Torpex is one of the explosives transported, yes.

"Question. But is it your understanding it is involved in this complaint?

"Answer. I don't have any understanding on that point.

4797 "Question. Was this a transportation accident? Was the stuff being transported at the time?

"Answer. It was being taken from freight cars, and loaded on ships. The material had been transported from various naval ammunition depots to Port Chicago, and was being taken from those cars by truck and by sling, and loaded on ships.

"How about the explosion at Hastings, Nebraska? Was that a transportation accident?

"Answer. Yes, it was, essentially. It occurred in what they call an exchange building, in which you have rails on one side and trucks on the other. The trucks bring the stuff up to the platform. It goes across the platform, and into the railroad cars.

"Question. Did this accident happen while the explosive was in transport?

"Answer. It did not happen, as far as we could make out from the results of the explosion, and from the witnesses whom we examined, and I

personally was at Hastings, Nebraska, within twenty-four hours of the time of the explosion, probably within twelve hours of the time of the explosion, and made a personal investigation, and from what I can tell, the explosion took place on the platform before the materials were in the car, or as it was going into a car.

"Question. How about the one at Yorktown, Virginia? Was that a transportation accident -- a rail transportation accident?

4798 "Answer. Inasmuch as the warehouse into which the explosives were being transported, from four flat cars, while it was an intraplant movement, I believe it could be classed as a rail --

"Question. The only thing I mean, was it being transported, was any rail car being rolled along the tracks?

"Answer. No, it was not."

Then there is a passage between counsel which I will read to clarify some of the later questions.

"Mr. Burgess;"" -- who was counsel for the railroads at this time -- "Mr. Commissioner, I don't think the counsel is correct in his definition of what transportation is. He seems to think transportation takes place when the car is sealed.

"Mr. Charuhas:" -- the Government counsel -- "I clarified it.

"Mr. Burgess: I just want the witness to understand it.

"Commissioner Mahaffie: The witness seems to know it pretty well.

"Mr. Burgess: I think he has a fairly good understanding."

And Government counsel continues with his questioning about these explosives that are referred to.

Question by Government counsel: "How about the one in Ravenna,

4799 Ohio?

"Answer. That is the case where the bomb --

"Question. I have to ask you a question first.

"Answer. Go ahead.

"Question. Was that an accident during transportation by rail?

"Answer. No, it was not.

"Question. That is all.

"Answer. May I add --

"Question. No, I didn't ask you anything. How about the one at McAllister, Oklahoma? Do you know the commodity involved there?

"Answer. Yes, I know the commodity. I have seen it, I have seen it, I have handled it.

"Question. What was it?

"Answer. Torpedo warheads.

"Question. Loaded with what?

"Answer. Torpex.

"Question. How about the next one, at Savana, Illinois? What was that, was that an accident involving transportation by rail?

"Answer. No, it wasn't, as you interpret transportation; as I interpret it, it was.

"Question. Let's talk about the Savana, Illinois. You say here it involved approximately 290,000 pounds of tetrytol, anti-tank mines, located in a standard 60-foot igloo type earth magazine. Would you say that involved transportation?

4800 "Answer. It is the starting of transportation.

"Commissioner Rogers: When you say 'transportation,' are you talking about transportation as defined on page 5 of the Interstate Commerce Act? I wish you would read that."

Government counsel: "I thought I said, Mr. Commissioner, by transportation in this case I meant actually being in a freight car, rolling along the tracks.

"Commissioner Rogers: I think you ought to make that clear to the witness."

Government counsel: "I did."

"The Witness: I said under his interpretation, as I understand his interpretation, the accident at Savana would not be of that type, although from my point of view it is a transportation accident."

Question by Government counsel: "How about the --

"Answer. It certainly is connected with transportation.

"Question. How about Smithfield, North Carolina?

"Answer. That was a case where a passenger automobile and a semi-trailer collided and it was transportation according to my definition, but, of course, according to yours, rolling along rails, it wouldn't be.

"Question. That is all I am concerned with.

"How about Norfolk, Virginia? How about that explosion?

4801 "Answer. That was where some trailers were being transported through the establishment, and one of them fell off and dragged, being loaded with torpex, a very sensitive explosive developed during World War II. One of them let go and all the bombs on the trailer went, and did considerable damage.

"Question. In regard to that, you say: 'One of the bombs fell off the trailer and was dragged a few feet.'

"Answer. That is right.

"Question. What do you mean by 'a few feet'? Do you have any knowledge how many feet that bomb was dragged?

"Answer. It was developed very clearly, from people who were in the vicinity, this happened right at a cross section, at a cross road, where there were numerous people, and people who escaped indicated that the bomb had only been dragged a very few feet. That has been proven by many subsequent accidents, in which torpex loaded in thinly walled ammunition can be exploded either by shock or by friction.

"Question. Yes, but you can't tell me what you mean by a few feet, that was my question.

"Answer. A few feet -- probably 20 or 30 feet.

"Question. Do you know that to be a fact, 20 or 30 feet?

"Answer. I believe it to be a fact." And then I would like to turn to page 9443 which is on redirect examination, Your Honor, by railroad counsel.

4802 "Question. (By Mr. Burgess) Now, assuming, for reasons that have not yet been disclosed by the record, that the complainants here have withdrawn

their claims for reparation in regard to Torpex, let me ask you this question: Did the handling of Torpex, in transportation, during World War II, add to the hazard from the explosion of other explosives?

"Answer. Yes, it did. In other words, if there was an explosion of another type of explosive, and Torpex was in the vicinity, would Torpex go, too; is that the question?

"Question. Or vice versa?

"Answer. Or vice versa.

"Question. That would be true?

"Answer. Yes.

"Question. Also, would the handling of large quantities of explosives that were transported during World War II add to the normal hazards?

"Answer. Yes, very frequently, I would say; over that of the previous ten years."

That is all I have.

THE COURT: All right.

MR. WRIGHT: The next exhibit, 105-D, is the testimony of William A. Kenney. I will read the parts we have, and I think that it doesn't matter who reads the additional parts they may have so long as they are read in sequence. I think it is important to get the testimony in in the sequence in which it was

4803 given.

THE COURT: All right.

MR. WRIGHT: And the first question is by Mr. Cousins.

"Mr. Kenney, will you give the reporter your name?

"Answer. William A. Kenney.

"Question. Your occupation?

"Answer. Supervisor of explosives, Pennsylvania Railroad."

Then I am proceeding to 9503, the question at the bottom of the page.

"Question. In the course of your employment, have you recently investigated a serious explosion at South Amboy, New Jersey?

"Answer. Yes. An explosion of great magnitude occurred at 6:26 P. M. (Eastern Standard Time) on Friday, May 19, 1950, at the powder pier on the Raritan River, connecting with the railroad yard of the Pennsylvania Railroad at South Amboy, New Jersey. The explosive material involved was in the process of transfer or had been transferred from railroad cars which had been previously delivered to the Healing Lighterage Company which was to perform the lighterage. The Healing Company had four lighters at the powder pier either loaded or in the process of being loaded to transfer this explosive material to the S.S. Flying Clipper at the anchorage in Gravesend Bay. The powder pier was in a low-lying cove, surrounded by railroad em-
4804 bankments and switching humps in the railroad yard. The lighters were riding low, both from lading and low tide.

"Sheet 2 of my Exhibit shows the car numbers, the time of unloading, the lading and pounds of explosive material with the name of the lighter to which it had been or would have been transferred. Also shown on that sheet is a schematic representation of the relative positions of the cars and lighters at the time of the explosion.

"The operation of transferring the explosives from the railroad cars to the lighters began about 8:40 A. M., May 19th, when two cars were placed in position for unloading with three others waiting. After the two cars had been unloaded, they were moved out of the way and the three cars spotted for unloading. The remaining seven cars, all anti-tank mines, were moved together from Trenton and did not arrive in South Amboy until 11:20 A. M. on May 19th.

"When the first five cars had been unloaded, they were removed from the pier and the other seven cars were placed for unloading. At the time of the explosion, four of the last seven cars had been unloaded. Two were in the process of being unloaded -- about half the cargo remained in each freight car. The seventh car still retained all its cargo.

"What happened then was described by Luke J. Lyons when he was questioned the next day in the hospital:

4805 "'Up from that there's a little house, hose and fire equipment place, and I had my car parked there toward the pier. We took it and swung it around, backed it down about twenty feet, I would say, twenty-five feet, from that little shanty, toward the yard office. I got out and I called Stolte to come on and have a cup of coffee and sandwich with me. I had a thermos bottle of coffee and two sandwiches. I would say it was five or ten minutes after seven then. So we were sitting there eating and talking, and Stolte sat in the back seat and I sat in the front seat facing the opposite way to the powder pier. All of a sudden I heard like a cannon going off, really very loud. All I did, I just went down, tried to hug the bottom of the car -- the glass breaking and the car breaking all over. I heard Stolte yelling, 'Get the door open! There's water coming in!' I got the door open, ran out, ran the way the water is going. I got up to anywhere from 100 to 150 feet from the engine house there, and it cleared up. I looked back. There was no sign of powder cars, no sign of barges or lighters, and no sign of anything living; and the pier was gone.'

"The explosion killed 31 people, and more than 350 persons were injured. All those who were killed were at the site of the explosion.

"The best over-all estimate is that property damage will exceed $15 million. The property damage ranged from an average limit of about 1200 feet for serious structural damage to an average distance of 100, 000 feet for
4806 broken glass. Other types of damages extended out to varying limits between these two. Furniture in nearby houses suffered damage from the inward push of the pressure wave and again by the outward pull of the suction wave.

"No attempt can be made at this time to itemize the damage done by this explosion, but its extent is indicated by the fact that the children of South Amboy could not return to one of the school buildings for their Fall Term as repairs were not completed until October, 1950, nearly five months after the blast in May, 1950.

4807 "Sheet 3 of my Exhibit shows the situation at South Amboy at the time of the explosion. Notes indicate the various fixed facilities and other notes indicate cars, barges, locomotives, et cetera.

"Sheet 4 of my exhibit shows the situation after the explosion, with photographs and notes to illustrate its effect."

MR. WRIGHT: What part do you want?

MR. McGLOTHLIN: That is as far as I wanted.

MR. WRIGHT: Then going over to Page 9508:

"Question. How did the cars of explosives reach South Amboy?

"Answer. Of the 12 cars of explosive material that were involved in the accident, ten were shipped by the Kilgore Manufacturing Company at Newark, Ohio. The other two cars both containing dynamite were shipped by the Hercules Powder Company from Lake Junction, New Jersey.

"Ten cars from Kilgore were originally consigned to Earle, New Jersey for handling through the Navy facility at Leonardo, New Jersey, but refusal of the Naval authorities resulted in their being diverted by the consignee to South Amboy. Three of these cars were routed via the Baltimore & Ohio,
4808 Western Maryland, the Reading, and the C.R.R. of New Jersey and were diverted to South Amboy at the Oak Island Junction interchange point between the C.R.R. of N.J. and the Pennsylvania, at 7:00 P.M., May 18, 1950. Two of these three cars contained anti-personnel mines and the third one contained anti-tank mines.

"The cars were moved from Oak Island Junction, Engine 5955, to our adjacent yard at Waverly in a cut of 52 cars, without cabin, with the explosive cars at the rear, and the movement made via yard tracks. The cars were dispatched from Waverly in Train A-5, Locomotives 1275-3871, 3:50 A.M., May 19, 1950, standing 31st to 33rd inclusive, from the head end, and 68th to 70th, inclusive, from the rear end.

"The cars arrived at Brown Yard, South Amboy, 5:05 A.M., May 19, 1950. This movement was through a highly built up area, including residential sections of Rahway and other small towns, and also including industrial areas with factories and plants and at least one refinery with a sizeable petroleum tank farm directly adjacent to the right-of-way.

"The other seven cars all containing anti-tank mines and traveling
4809 the same route were diverted from Earle to South Amboy by the

Reading Railroad at Rutherford, Pa., coming to the Pennsylvania at Belmont Interchange in Philadelphia at 8:20 A. M., May 18, 1950. These seven cars of high explosives were moved from Belmont to 53rd Street Receiving Yard with Locomotive 9275 as the hauling engine and No. 8260 as the pusher, in a cut of 39 cars, without cabin, the group of seven standing 19th from the head end, and 15th from the rear end. The cars were yarded on Track #14 in the 53rd Street Receiving Yard at 2:55 P. M., May 18, 1950. This movement was via yard tracks, except when passing through zoo interlocking.

"The seven cars of explosives and the following car, MILW-19776, were switched out and placed on another yard track temporarily with the engine holding on to the cars between it and the cars of explosives. The balance of the cars were then returned to track #14 and coupled to the other cars constituting the interchange movement. Then the engine returned to the point at which the explosive cars had been set off, brought them back to track #14 and coupled to the other cars constituting the interchange movement. Then the engine returned to the point at which the explosive cars had been set off, 4810 brought them to track #14 and placed them at the rear of the interchange out. This special movement placed the cars of explosives on the rear of the draft of cars and in such a position that upon their arrival at the apex of the hump, the cars could be pushed over the hump into the classification yard to track B-10 after which the spacer carrwas placed on track B-3.

"Yard shifting engine 5930 in making up the train to be picked up by the road train N-30 and B-11 by flat yard shifting at 44th Street end of 52nd Street yard. This work was completed by 1:51 A. M., May 19, 1950, the pickup for N-30 consisting of 53 loaded and 14 empty cars.

"N-30, with motor 4785, was called at South Philadelphia engine house for 11:00 P. M., May 18, 1950, and left Greenwich Yard, South Philadelphia, with six loaded cars, picking up enroute 14 more cars at Penrose Yard, after which the further pick-up of the cars at "Zoo" interlocking was made, with train N-30 leaving "Zoo" with a total of 87 cars at 4:16 A. M., May 19, 1950. The seven cars of explosives stood 45th to 51st, inclusive, from the head end. The cars of explosives were set off at Trenton, New Jersey, at 7:45 A. M.,

4811 May 19, 1950. The route of movement passed through Zoo interlocking and then through a densely populated area with houses backing right up to the railroad tracks. The route of these seven cars of mines then passed through a very large industrial complex with very valuable properties directly adjacent to the right-of-way. Through Trenton the area is at least as densely populated and industrialized.

"From Trenton the cars were moved by Locomotive 5369 to South Amboy, leaving at 8:55 A. M., May 19, 1950, with five spacers ahead and five at the rear of the explosive cars. Train arrived at South Amboy 11:20 A. M., May 19, 1950.

"The two cars of dynamite, CB&Q-22739 and NP-15515, were received from the C. R. R. of N. J. at Phillipsburg, New Jersey, May 16, 1950, at 11:50 P. M., and were moved therefrom in BL-1, locomotive 587, 9:10 A. M., May 17th, arriving at Trenton 12:01 P. M. same date, standing 31st and 32nd cars from the head end, and the 99th and 98th cars from the rear end. These cars were dispatched to South Amboy in Train A-2, Engine 4841, 10:15 P. M., May 17, 1950, arriving at the latter point at 11:15 P. M., May 17, 1950.

4812 "The two cars of dynamite were received at Brown Yard (a receiving yard just outside of South Amboy) on Train A-2, Engine 4841, on the night of May 17, 1950. The cars were set off on the "Plug Spur" where they remained awaiting orders. The three cars (two of A-P mines and one of A-T mines) arrived at Brown Yard on Train A-5, Engines 1275-3871, on the morning of May 19th and were set off on the "Plug Spur" awaiting orders.

"These five cars were ordered to the 'Powder Pier' on the morning of May 19th and yard engine with an idler, coupled to the east end of the five cars and pulled them from Brown Yard to South Amboy. In South Amboy Yard the engine and idler were detached because the cars of explosives had to be pushed on to the powder pier. It was necessary for the engine to get another idler and go to the other end of the five cars, couple to them and finish the shifting operation from that position.

"The seven cars of A-T mines arrived at South Amboy with Engine 5369 at 11:20 A. M. on May 19th. Over and above the special service given

cars of explosive material, these cars were given an expedited handling because of their late arrival on the day they were to be transferred to the "Flying Clipper." These cars were immediately moved to the powder pier
4813 for transfer to the waiting lighters."

MR. McGLOTHLIN: That is all I want read. Are you through?

THE COURT: Have you finished what you want read, Mr. Wright?

MR. WRIGHT: We have one part. But I think the --

MR. McGLOTHLIN: If we are going to keep the sequence, I have a portion commencing on 9515. I can read that before Mr. Wright's next passage.

THE COURT: Very well.

MR. McGLOTHLIN: I will start with the first question on Page 9515:

"Question. Can you relate the history of the regulations governing the transportation of explosives and other dangerous articles by railroad?

"Answer. The early history of the regulations is intimately related to the establishment of the Bureau for the Safe Transportation of Explosives and other Dangerous Articles. The efforts of the railroads in this direction are summarized in an American Railway Association paper dated May 21, 1921, "A short History of the Bureau of Explosives and Remarks on Advantages of
4814 Membership."

"In April, 1905, Mr. James McCrea, then Vice-President of the Pennsylvania Railroad, advocated before the American Railway Association the appointment of a committee to prepare regulations to promote the safe transportation of explosives. For more than fifteen years the railroads had struggled by individual efforts to decrease the chances in favor of fires and explosions on railroad property. These efforts had not prevented many serious disasters. The necessity for some concerted action by all roads was apparent.

"The efforts of Mr. McCrea were followed by the appointment of a committee on explosives and other dangerous articles to prepare and present to the American Railway Association at its meeting in October, 1905, a set of regulations for the transportation of explosives, in order that after approval by the Association, these regulations might be recommended to its members for individual adoption and enforcement. While the personnel of this committee

was still under consideration, one of the most disastrous explosions that had ever occurred in the United States happened at Harrisburg, Pa., on May 11,
4815 1905. Twenty lives were sacrificed and the financial loss exceeded $600,000. During the summer of 1905, the committee worked diligently on the preparation of the regulations, employing additional civilian experts on explosives and consulting representatives of the Army and Navy Bureaus of Ordnance.

"In October, 1906, a year after their adoption and publication, the Association decided that some central agent of all the roads was necessary for uniform enforcement of these regulations, and it approved a constitution and by-laws for the "Bureau of Safe Transportation of Explosives and Other Dangerous Articles.' Membership in this Bureau was optional and it was not until seven months later that the practical work was started by opening the office of the Chief Inspector in New York City. At this time (June, 1907) the membership comprised 78 railroad companies, operating 136,026 miles.

"The American Railway Association also made every effort to obtain effective legislation on the subject, and these efforts were outlined by Colonel Dunn, original and long time Chief Inspector of the Bureau, as follows:

"In June, 1907, and at the urgent solicitation of the American Rail-
4816 way Association, an officer of the regular army with experience in manufacturing, testing and using explosives, was placed on special duty, by direction of the President of the United States, to advise and assist this Association in its efforts to promote the safe transportation by rail of explosives and other dangerous articles. One early and prominent feature of this work consisted in preparing and recommending the passage of the Act of Congress of May 30, 1908, which repealed obsolete Federal laws and vested the Interstate Commerce Commission with authority to prescribe regulations."

"A final quote from the Twenty-Second Annual Report of the Interstate Commerce Commission will show how the regulations were finally formulated and published:

"An Act approved May 30, 1908, relating to the transportation of explosives and other dangerous articles in interstate commerce, required the

Commission, within ninety days from the passage of the act, to formulate regulations for the safe transportation of explosives, such regulations to be binding upon all common carriers engaged in interstate commerce which transport explosives by land. Accordingly, within the time prescribed the Commission assigned the matter for hearing, at which were present rep-
4817 resentatives of the War and Navy Departments, of railroads, and of substantially all manufacturers of explosives. The rules for the transportation of explosives previously adopted by the American Railway association were used as a basis for discussion at the hearing, and objections to those rules on the part of shippers were considered by the Commission. After such modification of the proposed rules as appeared proper or necessary, the regulations were formulated and published, to become effective on October 15, 1908."

"Question. Are you familiar with the original rules promulgated by the American Railway Association in 1905, and if so, have you compared them with the current Interstate Commerce Commission Regulations governing the transportation of explosives?

"Answer. I have very carefully compared the 1905 rules with the regulations as they now stand. It is very striking to any one familiar with the current regulations that the 1905 rules embodied at this early date every fundamental precaution still prescribed by the Interstate Commerce Commission regulations. The 1905 rules were, of course, relatively simple and compact. However, just as in the current regulations, they prescribed all the important
4818 limitations with respect to the condition of the car and running gear, the packaging, loading and bracing, the placarding of cars, the limitations on the placement toward the center of the train and away from certain other freight that might endanger the explosives car, the inspection of cars en route, the restriction against moving explosives in passenger trains, as well as most of the other items specified by the current regulations.

"The 1905 rules also contained the prohibition -- very important from the safety point of view, but extremely burdensome to railroad operation -- against cutting cars off in motion. Even at this early date, the operation of

the yards was complicated by the essential requirements that explosives cars were not allowed to be struck by other cars and that they should be segregated to positions of safety while in the yards. They also had to be separated from the locomotive by an idler car.

"Thus the most fundamental and burdensome rules have existed from the early beginnings of the current regulations. The significance of this, it seems to me, is that there are basic limitations on the kinds of
4819 precautions that you can take in attempting to protect against the hazard involved in the transportation of explosives by rail.

"The limitation on the precautions that the railroads can take are illustrated by the explosions listed in my exhibit. Some of them, for instance, show that large quantities have exploded with relatively limited casualties. These events have occurred in plants or storage places where the Government or other authorities have (1) isolated the explosives in remote, sparsely settled districts, (2) spaced the various elements of the plant or depot in accordance with the Tables of Distance, (3) used safety structures, (4) restricted the numbers of personnel permitted to collect together.

"Thus, while the best precautions the railroads can take have been established for many years, there has been no tendency to relax the fundamental requirements. In general, the changes in the regulations over the last forty years have been in the direction of placing a heavier burden upon the railroads. Many detailed changes have been made over the years, nearly every one of them toward making the details of the regulations more restrictive with respect to railroad operations. I do not wish to imply that
4820 these changes, which have been worked out so carefully by the railroads and all concerned, are not desirable improvements. However, it must be obvious that the basic and important precautions have long been prescribed, and that the improvements subsequent to the original rules must add relatively less from the point of view of safety in proportion to the extra burden imposed upon the railroads.

"The one possible exception to the above statement is that the railroads had to drop the limitation of the 1905 rules providing that explosive cars

must not be placed on a train within five cars of each other, and that not more than three such cars can be placed in any one train. The value of such a rule from a safety point of view is doubtful, because the best it can accomplish in this direction is to prevent concentrations of several carloads, while at the same time the rule would increase the chance of explosion by multiplying the handlings required for each car. In addition, it is my opinion that at a time such as the period of World War II when explosives moved in large volume, such a rule would have been literally impossible from a physical point of view.

"Question. Did the regulations effective during World War II still
4821 contain provisions with respect to packaging and loading explosives?

"Answer. The regulations provide that the railroads shall not accept explosives for transportation unless they are properly packaged and loaded in the car. The Bureau of Explosives is constantly vigilant to ensure proper, safe packaging practices. The Bureau publishes specifications which it makes available to all shippers of explosives, and works with the shippers, including the Government, to work out the best packaging and loading practices for each type of explosives shipped.

"Question. As Supervisor of Explosives for the Pennsylvania Railroad, do you file reports with the Bureau of Explosives?

"Answer. Yes. I file reports for the Pennsylvania pursuant to the following section of freight tariff No. 4, the Interstate Commerce regulations Governing the Transportation of Explosives and other Dangerous Articles:

"511 (a). Serious violations of these regulations (such as defective packing, improper staying, or rough treatment of car), and accidents, fire or explosions, and leaking or broken containers occurring in connection with the transportation or storage on carrier's property of explosives or other
4822 dangerous articles, must be reported promptly by the rail carrier to the Bureau of Explosives."

That is all I have.

THE COURT: All right.

MR. WRIGHT: I may as well read the rest of this through:

THE COURT: Very well.

MR. WRIGHT: (reading)

"Question. Have you examined the Bureau of Explosives files based on such reports of improper staying, defective packing, or other such subjects?

"Answer. I have. I find a number of items classed as 'negligence of employees' which refers to both railroad employees and employees of shippers of explosives. For the War Period, 24 reports of this kind are listed under 'negligence of employees,' 1941 through 1945, and included in the Annual Reports. The files show that 23 of these were negligence of shippers' employees -- principally government employees.

"Also reported under Section 511 (a) are a very large number of cases of minor property loss in the nature of ordinary loss or damage, such as damaged packaging, leakage, et cetera. For the years 1941 through 1945 there
4823 were 164 reported cases of improper loading of explosives for transportation and 50 cases of defective containers for shipments furnished by the shippers of explosives. Of the 50 reports of defective containers, 47 reports relate to defective containers of explosives shipped by the Government. About an equal proportion of the reports of improper loading concerned faulty loading by the Government of Government shipments.

"It is apparent from the files, and I know as a matter of experience, that the reports filed by employees of the individual railroads depend upon varying interpretations of Section 511 (a), and reports of "serious violations" are by no means consistent. The practice has differed from time to time and as between individual railroads and individual reporting officers. Therefore, the most one can say about the above cases or about any other such reports is that the particular reports have been filed. You cannot tell how many more such events actually occurred. Only from an examination of the individual reports can you tell whether they relate to shipments. For instance, there are reports covering losses and injuries to employees by reason of malfunctioning of railroad fuses,

or by unknown explosives which have gone off in rail transportation, as when
4824 an explosion in a car of lumber injured one employee, and when a bomb exploded in a parcel post package. The lists of casualties and property damage in Annual Reports include such cases as well as such items as the explosion of fireworks and the discharge of loaded fire-arms in luggage.

"Question. Can you summarize the efforts of the railroads to protect movements of explosives?

"Answer. As shown in detail in the record in this case, the handling of explosives is unique from an operating point of view. We make every effort to insure their safe transportation. In the end, however, our problem is not unlike that of the Government facilities handling their own explosives, as described in the testimony before the Coast Guard Board investigating the South Amboy explosions by Captain Andrew G. Shepard, U.S.N.R., attached to and serving at the Naval Ammunition Depot, Earle, as Commanding Officer, who stated:

"I would like to say that in answering your questions as to the serving Earle procedures we make no pretense to be paragons of virtue in handling explosives. There is no such thing as the acme of perfection in that area and there is no such thing as absence of hazard; we just do the best we can."

* * *

INTRODUCTION OF PLAINTIFF'S EXHIBIT 128

4827 MR. WRIGHT: This first page of this document is a telegram from Mr. Joseph Hays to the following individuals, and I will read the identification of these individuals as they appear in the AWR interrogatory answers as I refer to them here.

The first addressee is M. J. Galvin, Attorney, 207 Union Station Building, St. Paul, Minnesota, who, according to the interrogatory answer, was a member of the State Railroad Legislative Committee.

The next addressee is C. A. Hummel, Chairman, Wisconsin Railroad Association, 406 Wisconsin Power and Light Building, Madison, Wisconsin.

The next addressee is M. F. Hicklin, Secretary, Iowa Railroad Committee, 507 Bankers Trust Building, Des Moines, Iowa.

4828 The next is J. W. Weingarten, 525 Sharp Building, Lincoln, Nebraska, who was identified in the interrogatory answers as with the Chicago, Burlington & Quincy.

The next is C. J. Putt, c/o Atchison, Topeka & Santa Fe Railroad, Topeka, Kansas, who was identified as a solicitor for the Kansas, Atchison, Topeka and Santa Fe Railroad.

And the next addressee is Don Welch, Oklahoma City, and the interrogatory answer supplied no information as to him.

The next was Walter Little, Sacramento, California; also no information as to him.

The next is J. G. Street, Johnson Building, Denver, Colorado, and he was identified as the General Attorney for the Colorado and Southern Railway.

And the last is Leo J. Crowley, Colorado Railroad Association, Equitable Building, Denver, Colorado, who was identified in the interrogatory answer as Secretary of the Colorado State Railroad Association.

The first telegram is dated March 9, 1953, and it reads as follows:

"Of possible interest regarding legislation on trucking of explosives, expect to have finished by Friday twelve newspaper size pages of --"

THE COURT: Can you make that out, Mr. Ball? Do you have a copy of it?

4829 MR. BALL: I have a copy.

MR. WRIGHT (Reading): "Explosives newspaper clippings and paragraphs showing truck accidents movement of explosives and editorials regarding same."

MR. BALL: That is "photographs", Mr. Wright. It is: "Photographs showing truck accidents."

MR. WRIGHT: (Continuing reading): "Photographs showing truck accidents movement of explosives and editorials regarding same. Should be very effective piece. Will ship sample copies and await your instructions as to supply you may need after your opportunity to review.

"Joseph H. Hays."

* * *

DIRECT EXAMINATION OF MR. PERRIN BY MR. LAYNE

* * *

4851 THE COURT: Now, Mr. Shea, of course, I will hear you. I think it is perfectly apparent to all counsel on both sides that the Court is conscious -- I hope I am, at least -- of what the First Amendment of the Constitution provides.

4852 The Plaintiff's theory in this case -- I don't know whether the Jury will agree with the theory or not -- was that these bills, as I understand it, were just one of many so-called overt acts pursuant to an unlawful conspiracy which had for its objective the driving out, you might say, of the Riss Company, from this type of business, explosives business.

They may be perfectly legal upon their face, but the theory of the Plaintiff is that a lawful act cannot be used to carry out an unlawful objective, as I understand their theory.

Now, it is a matter for the Jury to decide whether or not there has been sufficient evidence, at the time they get the case, to show an unlawful conspiracy and that two or more of these defendants combined or conspired pursuant to that conspiracy to violate the antitrust laws.

I will go into greater detail at the proper time.

Mr. Rhoads, yes, sir.

MR. RHOADS: If Your Honor pleases, irrespective of what the theory of the Plaintiff may be in this case, I respectfully suggest to Your Honor that the time when a bit of evidence is offered as completely as it has been in this case against all defendants, there must be a showing --

THE COURT: I hadn't finished, Mr. Rhoads.

4853 MR. RHOADS: I beg your pardon, sir.

THE COURT: Now, Mr. Layne, just give us a brief summary of the evidence in the case so far that you contend justifies the admission into evidence of all these bills.

MR. LAYNE: I won't relate --

THE COURT: I don't want you to summarize every witness and every letter and document.

MR. LAYNE: No, Your Honor. I only want to refer to the deposition that we read of Mr. Hardy, in which the genesis of these bills was gone into -- he was asked about the genesis of such legislation. The correspondence with Carl Byoir & Associates. But more particularly, the deposition of Mr. Lewin W. Wickes, Jr., in which he testified as to the origin of a bill to limit explosives to 5,000 pounds in the transportation through any state, for the reason that the counsel in the Sub. 84 case had conceived that this would solve the problem better than they could solve it before the Commission.

Also, Mr. Wickes testified that he and Mr. Hays met at the Raleigh Hotel and that there was discussed and Mr. Hays brought with him a draft of a 5,000-pound bill. That 5,000-pound bill was then discussed between them, and was taken over to Mr. Charles Hahn, Executive

Secretary of the National Sheriffs Association; and it was then published in the National Sheriff, with the suggestion that it be introduced.

4854 Also, he referred to the evidence that Mr. Wright had just read, the correspondence of Mr. Hays with the state legislative representatives, not only of the railroads, but the representatives of the railroad operating brotherhoods, in which they furnished publicity material to be used in connection with the promotion of this legislation to be introduced in these legislatures.

That, we contend, Your Honor, is the evidence on which we expect to introduce and connect up the bills.

4864 (The objections by Defendants Nos. 7, 81 and 88 to the Admission in Evidence of Plaintiff's Exhibits Nos. 148-158, 160-164 are as follows:

"The undersigned defendants object to the admission in evidence of Plaintiff's Exhibits Nos. 148-158, 160-164 on the following grounds:

"1. They are not relevant evidence of any issue material to plaintiff's case, in that: (a) there is no evidence or proffer of evidence showing that these or any other defendants had anything to do with the introduction of the said bills, or with the consideration of the bills after introduction; (b) plaintiff's own evidence establishes that it has never operated in many of the states, so that the bills introduced in such states do not come within the scope of Paragraph 14 (b) of the Complaint as Supplemented; (c) there is no evidence or proffer of evidence tending to show that

4865 these defendants utilized the introduction of the said bills or the proceedings of the State Legislatures in considering the bills as the vehicle for public relations activities of any kind; and (d) the 1955 bills were introduced some two years subsequent to the introduction of the 1953 bills, so as to have no apparent connection with such 1953 bills.

"2. The introduction and support of proposed legislation is a right guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and cannot give rise to anti-trust liability regardless of the intent or purpose for which such legislation was introduced or supported.

"3. Any additional grounds stated by other defendants."

(Objections by Defendants Nos. 7, 81 and 88 to the Admission in Evidence of Plaintiff's Exhibit 159.)

"The undersigned defendants object to the admission in evidence of Plaintiff's Exhibit No. 159 on the following grounds:

"1. It is not relevant evidence of any issue material to plaintiff's case, in that: (a) there is no evidence or proffer of evidence showing that these or any other defendants had anything to do with the introduction of the said bill in the 1955
4866 session of the South Carolina Legislature or with the consideration of the bill after its introduction; (b) plaintiff's own evidence establishes that it has never operated in South Carolina, so that the bill does not come within the scope of Paragraph 14(b) of the Complaint as Supplemented; (c) there is no evidence or proffer of evidence tending to show that these or any other defendants utilized the introduction of the said bill or the proceedings of the South Carolina Legislature in considering the bill as the vehicle for public relations activities of any kind; and (d) the said bill was introduced in the South Carolina Legislature some two years subsequent to the introduction of similar bills in other state legislatures so as to have no apparent connection with such other bills.

"2. The introduction and support of proposed legislation is a right guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and cannot give rise to anti-trust liability regardless of the intent or purpose for which such legislation was introduced or supported.

"3. Any additional grounds stated by other defendants."

4867 (Objections of Defendant 66 are as follows:)

"Defendant 66 objects to the admission into evidence of each of the following exhibits on the grounds that:

"1. The facts that the document is offered to prove are irrelevant to any issue in the case.

"2. The document is not a declaration in furtherance of any conspiracy.

"3. No connection has been shown between this defendant and the introduction of any of the purported bills of which Exhibits 141-164 purport to be copies.

"4. The authorship, support, sponsorship, and encouragement of state legislation is protected by the Constitution of the United States, and cannot form the basis for any inference of the existence of an unlawful conspiracy, cannot be regarded as an overt act in violation of law, and cannot be used as any evidence of liability under the antitrust laws.

"Plaintiff's Exhibits to which the foregoing objections are made by this defendant are the following: 141-164, inclusive."

(The objections of Defendants the Association of Western Railways and the individual Western Railroad Defendants are as follows:

4868 "Plaintiff's Exhibit 141

"(California Assembly Bill No. 3394 (as amended))

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That this bill shows on its face actions of a state legislature in amending a measure before it, and that such actions on the part of a state legislature cannot constitute activity in furtherance of an alleged conspiracy to violate the antitrust laws or constitute evidence of the existence of an alleged conspiracy or con-

4869 stitute grounds for recovery in an antitrust action.

"3. That plaintiff has admitted (answer to Interrogatory 208 (25) of the interrogatories served June 16, 1959, by AWR et al.) that Assemblyman Morris of the California Legislature was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

"Plaintiff's Exhibit 142

"(Oklahoma H. B. No. 987)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

4870 "2. That plaintiff has admitted (answer to Interrogatory 208 (41) of the interrogatories served June 16, 1959, by the AWR et al.) that Representative Lou S. Allard of Creek County, Oklahoma, was neither a co-conspirator nor an agent of any defendant in the carrying out of the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibits 143 and 151

"(Colorado)

"These defendants object to the admission of these documents for the reason that they are wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

4871 "2. That plaintiff has admitted (answers to Interrogatory 208 (26) and (26), served June 16, 1959, by the AWR et al.) that Representative Parsons of Colorado Legislature and Senator Gill of the Colorado Legislature were neither co-conspirators nor agents of any defendants in carrying out the ends of the alleged conspirary.

"Plaintiff's Exhibit 144

"(New Mexico H. B. 114)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial, and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

4872 "2. That plaintiff has admitted (answer to Interrogatory 208 (38) of the interrogatories served June 16, 1959, by the AWR et al.) that Mrs. Lillian Thompson, of the New Mexico Legislature, who introduced the measure, was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 145

"(North Dakota H. B. No. 731)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspir-
4873 acy or evidence of the existence of such a conspiracy.

"2. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 146.

"(Nebraska Bill No. 474)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answer to Interrogatory 208 (37) of the interrogatories served June 16, 1959, by the AWR et al.) that Hal Bridenbaugh of Dakota
4874 City, Nebraska, who introduced this bill, was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibits 147 and 148

"(Minnesota Senate Bill F 626 and Minnesota House Bill HF 847)

"These defendants object to the admission of these documents for the reason that they are wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answers to Interrogatories 208 (34) and (35) of the interrogatories served June 16,
4875 1959, by the AWR et al.) that Senator Carey, of the Minnesota Legislature, and Representative Annie C. Warvick of Duluth, sponsor of the House Bill, were neither co-conspirators nor agents of any defendant in carrying out the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of these bills in the legislature.

"Plaintiff's Exhibit 149

"(Maryland Senate Bill No. 236)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of any illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That there is no evidence that any of these
4876 defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 150

"(Kansas Senate Bill 106)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answer to Interrogatory 208 (29) of the interrogatories served June 16, 1959, by the AWR et al.) that Senator Croxton of the Kansas

Legislature was neither a co-conspirator nor the agent of any defendant in carrying out the ends of the alleged conspiracy.

4877 "3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 152

"(Utah H. B. No. 212)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answers to Interrogatories 208 (43) and (44) of the interrogatories served June 16, 1959, by the AWR et al.) that Mesdames Jack and Vance of the Utah Legislature were neither co-conspirators nor agents of any defendant in the carrying out of ends of the alleged conspiracy.

4878 "3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 153

"(Wisconsin Assembly Bill No. 811, A)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answers to Interrogatories 208 (42) and (137) of the interrogatories served June 16, 1959, by the AWR et al.) that Assemblyman Romell, of Adams, Wisconsin, who introduced the bill, and R. W. Cowan, who requested Assemblyman Romell to introduce the
4879 bill, were neither co-conspirators nor agents of any defendant in the carrying out of the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 154

"(Wyoming H. B. No. 58)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the fights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answer to Interrogatory 208 (45) of the interrogatories served June 16,
4880 1959, by the AWR et al.) that F. L. Chamberlain of Goshen County, Wyoming, who introduced the bill in the legislature, was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 155

"(Nebraska L. B. No. 412)

"These defendants object to the admission of this document for the reason that is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

4881 "2. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 156

"(Montana House Bill No. 361)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answer to Interrogatory 208 (36) of the interrogatories served June 16, 1959, by the AWR, et al.) that Representative Emmons, who introduced this bill, was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

4882 "3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 157

"(Delaware Senate Bill No. 105)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 158

"(Iowa House Bill No. 398)

"These defendants object to the admission of this

4883 document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answer to Interrogatory 208 (28) of the interrogatories served June 16, 1959, by the AWR et al.) that Representative Raymond Pim of Lucas County, Iowa, who introduced this bill, was neither a co-conspirator nor the agent of any defendant in carrying out the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

4884 "Plaintiff's Exhibit 159

"(South Carolina H. 1193)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot

constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 160

"(Utah House Bill No. 60)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

4885 "1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 161

"(Wisconsin Bill No. 495, A)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an

exercise of the rights of petition and assembly guaranteed
4886 by the First Amendment, and cannot constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That the bill shows on its face that it was introduced by the Committee of Transportation of the Wisconsin Assembly at the request of 'Railroad Brotherhood.'

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibit 162

"(Maryland H. B. 198)

"These defendants object to the admission of this document for the reason that it is wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot constitute either an act in furtherance of an illegal con-
4887 spiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answer to Interrogatory 208 (31) of the interrogatories served June 16, 1959, by the AWR et al.) that Delegate Joseph A. Acker of Baltimore, who introduced this bill, was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of this bill in the legislature.

"Plaintiff's Exhibits 163 and 164

"(Maryland H. B. 66 and H. B. 67)

"These defendants object to the admission of these documents for the reason that they are wholly irrelevant, immaterial and incompetent to prove or disprove any issue in this case, and for the following additional reasons:

"1. That the submission to members of a state legislature of proposed legislation, or the securing of the submission to members of a state legislature of proposed legislation, is an exercise of the rights of petition and assembly guaranteed by the First Amendment, and cannot
4888 constitute either an act in furtherance of an illegal conspiracy or evidence of the existence of such a conspiracy.

"2. That plaintiff has admitted (answer to Interrogatory 208 (140) of the interrogatories served June 16, 1959, by the AWR et al.) that William Payne, who introduced these bills in the legislature was neither a co-conspirator nor an agent of any defendant in carrying out the ends of the alleged conspiracy.

"3. That there is no evidence that any of these defendants had anything to do with the introduction of these bills in the legislature.

* * *

BY MR LAYNE:

4894 Q. In connection with your duties as counsel for the Military Traffic Service of the Department of Defense, did the bills, Plaintiff's Exhibits 141 through 164 come to your attention?

A. Yes, they did at various times and under various circumstances.

Q. Now, can you tell me how these bills came to your attention?

A. Well, many of the bills were conveyed to the Department through the field installations of the military establishment. Others came through other channels. I am almost sure the great majority of them came -- the information with respect to them and the bill, itself, came through the field installations of the military establishment.

Q. On occasion, were bills called to your attention by motor carriers?

A. They were.

Q. Now, can you tell us, Mr. Perrin, of your own knowledge, what if any position was taken by the Department of Defense with respect to those bills, Plaintiff's Exhibits 141 through 164?

* * *

MR. PERRIN:

4896 A. Well, the position that the Department of Defense, after it was cleared policywise, with the military departments, that is, the Department of the Army, Department of the Air Force, and Department of the Navy, and from a public relations and legal standpoint with the office of the Secretary of Defense, the Department of Defense decided to oppose these bills as they were introduced in the various states.

MR. BALL: It is understood, of course, that we have a standing objection to irrelevance on this.

THE COURT: Your objection will go to all the testimony on the grounds you have stated, yes, sir.

BY MR. LAYNE:

Q. Now, Mr. Perrin, could you tell us what groups within the Department of Defense, to your knowledge, considered these bills and considered the position to be taken with respect to these bills?

4897 A. Well, policy-wise the bills were considered by the Department of the Navy, the Bureau of Supplies and Accounts, by the Department of the Army and the Chief of Transportation, and by the Department of the Air Force, the Director of Transportation in the Air Force.

The heads of those three units formed an advisory counsel for the Director of the Military Traffic Service in the office of the Secretary of Defense.

The office of the Secretary of Defense, by virtue of the authority of the Secretary, had the sole decision in any of these matters. However, they were considered by the various services, and as far as my memory serves me, I think -- I'm almost sure that all the Departments concurred in the position of the Department of Defense, that they would object to these bills.

Q. Was the matter considered by the General Counsel of the Department of Defense?

A. It was, on every occasion where we opposed the bills.

Q. Now, Mr. Perrin, what,if anything, was done by the Department of Defense, the Military Traffic Service, to oppose the bills, Plaintiff's Exhibits 141 through 184?

A. Well, actually --

4898 MR. BALL: If the court please, I cannot see what the position of the Department of Defense has to do with moving any of the issues in this case.

THE COURT: All right, I will overrule you.

MR. LAYNE: Do you want me to repeat my question, Mr. Perrin?

THE WITNESS: Could he repeat it?

MR. McGLOTHLIN: Could I have the question read?

THE COURT: Read the question.

(Question read:)

THE WITNESS: Well, quite a bit of consideration was given in the Department to the method by which they would object to the bills, and it was --

MR. BALL: I move to strike that as just a summarization that is meaningless.

THE COURT: Well, just tell what was done.

THE WITNESS: Well, actually, what we did, we --

MR. McGLOTHLIN: Could we have the "we" defined?

THE COURT: Yes.

Would you define what you mean by "we?"

THE WITNESS: The Department of Defense opposed these bills through the Senators in various States.

THE COURT: Excuse me.

Did you take an active part in this matter yourself?

4899 THE WITNESS: Yes, sir, I did.

THE COURT: In the various stages?

THE WITNESS: Yes, sir.

THE COURT: And what did you do with respect to taking an active part?

THE WITNESS: Well --

THE COURT: I don't mean to cut in, but I would like to know.

THE WITNESS: I had the task of monitoring the position of the Department and setting it down on paper on various occasions, and preparing the testimony that was introduced in four States in connection with these bills.

THE COURT: All right, you may proceed.

MR. GATES: If Your Honor please, I wonder if we could ask or if Your Honor would be good enough to ask the witness what he means by the term "monitoring?"

THE COURT: Yes.

Would you explain that term, what you mean by that?

THE WITNESS: Well, that term is a term that is used quite extensively in the Government. The man that monitors any particular project in the Government is somewhat the man that spearheads the project. In other words, he sees that the job is done. That is generally what it means.

4900 THE COURT: Was that your assignment?

THE WITNESS: That is my assignment.

THE COURT: All right.

MR. GATES: Thank you, Your Honor.

THE COURT: All right.

BY MR. LAYNE:

Q. Now, Mr. Perrin, tell us what you did?

A. Generally we worked with the Senators and the Representatives on the Hill in connection with these bills. When there was a bill introduced we would go to the Senators and see if there was something that couldn't be done with respect to the State action on any bill.

MR. McGLOTHLIN: May I ask whether the witness means by "The Hill," the Congress of the United States?

THE COURT: Do you mean the Congress?

THE WITNESS: By "Hill" I mean the Congress of the United States.

THE COURT: You would talk to the Senators for that State; is that right?

THE WITNESS: That's exactly right.

THE COURT: All right.

THE WITNESS: And on those instances where we were unable to get the Senators or Representatives from the States to intercede with the State Government, we appeared and testified against the bills in those States.

4901 BY MR. LAYNE:

Q. Did you yourself testify, Mr. Perrin, in any of the States?

A. I testified in three States; Maryland, Wisconsin and Nebraska.

Q. Can you tell us the approximate times when you testified in the State of Maryland?

A. Well, again I am relying on my memory, but I believe it was 1953.

Q. And what year did you testify in the State of Wisconsin and the State of Nebraska? I believe you said Nebraska.

A. I believe it was the same year. It could have been --

Your Honor, I'm not exactly certain on those years.

THE COURT: You don't have to be certain, but just give your best judgment.

THE WITNESS: All right.

BY MR. LAYNE:

Q. Mr. Perrin, when you testified before the Maryland -- was it a committee of the Legislature of the State of Maryland you testified before?

A. It was.

Q. When you testified before the Committee, did you have a statement which you read to the committee?

4902 A. I did.

MR. LAYNE: I would like to have marked as the next Plaintiff's exhibit for identification, a six-page document entitled "Testimony of J. Frank Perrin, Military Traffic Service, Department of Defense, on Senate Bill No. 236."

MR. SHEA: Could you tell us the number of that prima facie case?

MR. LAYNE: This was given to you separately, and it is not among the numbers. It has been supplied, but it was not separately numbered as a prima facie document.

THE CLERK: Plaintiff's Exhibit No. 165 for identification.

(Thereupon copy of testimony of J. Frank Perrin, Military Traffic Service, Department of Defense, on Senate Bill No. 236, before Committee on Judicial Proceedings, Maryland Senate, 24 March 1953, was marked Plaintiff's Exhibit No. 165 for identification.)

THE COURT: Now, let me ask the witness a few questions before you proceed on this document.

MR. LAYNE: All right.

THE COURT: Were you going to have him identify it first?

MR. LAYNE: Yes, I would ask him to identify it.

MR. WHEELER: What is the date of it?

4903 THE WITNESS: This is dated 24 March 1953.

It was at 11 o'clock at night before the committee.

BY MR. LAYNE:

Q. I show you what has been marked Plaintiff's Exhibit for identification 165, and ask you, Mr. Perrin, if you recognize that statement? Look at it carefully.

A. Yes, sir, I do.

Q. Is that the statement presented by you to the Maryland Legislature on 24 March, 1953?

A. Yes, sir, it is.

THE COURT: Let me ask him a few preliminary questions.

MR. LAYNE: I understand, Your Honor.

THE COURT: Mr. Perrin, when was the last time you saw this statement before you took the stand today?

THE WITNESS: The last time I saw this (indicating)?

THE COURT: That's right.

THE WITNESS: Well, actually, I think it was about, oh, I would say a month and a half or two months ago.

THE COURT: Let me ask you this:

Can you from memory, without referring to that statement, tell us what you said before the Legislature, or would you need this in the interest of accuracy, to be sure that --

4904 THE WITNESS: Well, I would need this, Your Honor, because, actually, you know, this happened in '53.

THE COURT: I understand.

THE WITNESS: And that has been quite a few years ago.

THE COURT: All right, I will let you refer to the statement then.

All right.

MR. LAYNE: I was going to ask him a few more preliminary questions, Your Honor, before I offered it.

THE COURT: Very well.

BY MR. LAYNE:

Q. Mr. Perrin, did you prepare Plaintiff's Exhibit for identification No. 165?

A. Well, let's state it this way: I participated in it and monitored the operation.

Q. Was this statement reviewed in the Military Traffic Service?

A. It was.

Q. Was it reviewed by the Director of the Military Traffic Service?

A. It was.

MR. McGLOTHLIN: This is not a hostile witness, Your Honor. It seems to me that Mr. Layne can ask him by whom it was reviewed.

4905 THE COURT: Yes, you can reframe it as to by whom it was reviewed.

BY MR. LAYNE:

Q. Who participated in the drafting of this statement, Mr. Perrin?

A. Well, I can't remember the names of all the people that went in it, but they were representatives of the Bureau of Supplies and Accounts of the Department of the Navy, and the Chief of Transportation of the Department of the Army, and the Director of Transportation of the Air Force.

Now, the names of each one of those persons that participated in it, I don't remember.

I do remember one. Clement Mayo was one of the men, and he was from the Department of the Navy.

This testimony was prepared in a group, and I monitored the preparation of it. It was submitted to the General Counsel of the Department of Defense for his approval, and it was approved by him; it was approved by the Director of the Military Traffic Service; I believe at that time it was Kenneth Vore, if I am not mistaken, and it was also presented to his military traffic advisory council, which was the heads of the three transportation groups in the military services, namely, the Chief of the Bureau of Supplies and Accounts of the Department of the Navy, and the Chief of Transportation of the Department of the Army, and the Director of Transportation of the Air Force.

4906 Q. Mr. Perrin, with respect to this testimony before the Maryland Legislature, were you directed to appear before that committee?

A. I was.

Q. Who directed you to appear?

A. The Director of the Military Traffic Service and the General Counsel of the Department of Defense.

Q. Can you tell us, Mr. Perrin, from your own recollection, whether you --

Well, can you tell us, Mr. Perrin, whether you also had a prepared statement or presented a prepared statement in 1955, if you appeared at that time before the Maryland Legislature?

A. Well, my memory is not too good but if I appeared in 1955 I had a prepared statement, because all statements of the Department of Defense had to be cleared thproughly, from policy and legal standpoints, and if I testified at that time I did have a prepared statement which was approved by the Department of Defense.

Q. Do you know now, sitting there on the stand, whether you appeared in 1955 before the Maryland Legislature?

A. I am almost sure I appeared before the Maryland Legislature twice. As to the exact years and times, I am not so certain. It was either '53 or '54 or '55, or at least two of the years. I know that I appeared before them two times.

4907 THE COURT: Do you have the statement?

MR. LAYNE: No.

THE COURT: Very well, you may proceed.

MR. LAYNE: Your Honor, I would like to offer Exhibit 165.

THE COURT: All right, it will be received over --

MR. McGLOTHLIN: May we find out against whom it is being offered?

MR. LAYNE: It is being offered against the Pennsylvania Railroad and the Association of Western Railways.

MR. McGLOTHLIN: I assume it is also being offered for the truth of the statement?

MR. LAYNE: It is being offered as the statement Mr. Perrin made before the Legislature on behalf of the Department of Defense in opposition to this bill.

MR. McGLOTHLIN: May I have an answer to my question?

THE COURT: Are you offering it for the truth or just for the fact that he made this statement?

MR. LAYNE: He made this statement in opposition to the bill on behalf of the Department of Defense.

MR. McGLOTHLIN: Well, if your Honor please, on that basis

4908 it is immaterial. He has already said that.

If it is offered for the truth of the matter asserted, that is a different thing.

THE COURT: Well, I am not trying the case, I am only ruling on objections.

MR. McGLOTHLIN: I understand. I am objecting on the ground of immateriality, if it is offered to merely prove something the witness has already said.

THE COURT: On the ground it is immaterial, I will overrule the objection.

Let's proceed.

(Thereupon copy of the testimony of J. Frank Perrin, Military Traffic Service, Department of Defense before Maryland Legislature, marked Plaintiff's Exhibit No. 165, was received in evidence.)

BY MR. LAYNE:

Q. I would like to have you, if you will, Mr. Perrin, read to the jury the statement, Plaintiff's Exhibit No. 165.

A. This was the testimony I gave to a Committee on Judicial

Proceedings in the Maryland Senate on 24 March, 1953, on behalf of the Military Traffic Service of the Department of Defense.

THE COURT: Excuse me. Could you speak a little louder, please?

THE WITNESS: (Reading):

4909 "Mr. Chairman, my name is J. Frank Perrin. I am Counsel to the Military Traffic Service of the Department of Defense. The Military Traffic Service is an organization established by the Secretary of Defense on 23 August 1950, to provide for establishing policies for the efficient and economical procurement of transportation for the constituent military departments of the Department of Defense. I have been employed in the transportation field in various capacities since 1925.

"The Department of Defense has asked for an opportunity to be heard on Senate Bill 236 for the purpose of making your Committee aware of the effects that the enactment of the bill would have on the transportation of materials which are critical to the Department of Defense and to the defense effort.

"The proposal before you is designed to prohibit the transportation by truck over your State highways of explosives in quantities in excess of five thousand pounds. There are certain exceptions to permit truck movement when the explosive is to be used in mining, excavation, or in oil and gas production, and there is a further exception to permit the movement in periods of grave national emergency, but then only where the Governor in each instance permits the movement.

4910 "Your Committee will be interested to know that the bill introduced in your legislature has not been introduced in Maryland alone. The Department of Defense is aware of the introduction of bills substantially similar to this one in California, Colorado, North Dakota, Wyoming, New Mexico and Nebraska. Obviously, the proposal did not come spontaneously

to the minds of legislators in these widely separated states. It has sponsors and this Committee will be able to identify them as readily as the Department of Defense. The bill, which on first reading sounds like no more than a reasonable safety measure, would effectively destroy the Nation's ammunition trucking industry if it should be passed in the states I have named, and Maryland is one of the key states.

"Although the proposal permits weight loads of 5,000 pounds to be carried, the net effect of the legislation would effectively prohibit the transportation of almost all sorts of ordnance or chemical explosives over the highways, and would force the military and other essential defense agencies to rely on rail transportation for land movement of ammunition and explosives. Many individual ammunition items weigh more than 5,000 pounds themselves and in addition a total load of 5,000 pounds is so uneconomical that truckers would have to quote a
4911 prohibitive rate and would be driven out of the business. Present loads average about 30,000 pounds.

"The proposed legislation includes machinery for exemption for vital transportation of munitions during a national emergency in the form of a special individual permit for each shipment to be signed by your governor or his representative. At best such procedure will be wasteful in time and effort and at worst it will fail to operate. Even if this exemption and special permit plan were workable, we would still oppose the legislation because by removing all munition transport facilities from the state highways during the period when no 'grave' national emergency exists, it would break up the industry, scatter the trained men and divert the specially equipped and designed vehicles and terminal facilities to other uses. The trucks and men and facilities would not be available when we had to have them. The owners of the vehicles

could hardly be expected to keep them idle against some possible future emergency use.

"The Department of Defense considers that a healthy ammunition trucking industry in being is essential in the interest of national defense, and I will try to explain why we hold this view in answering the four following questions:

4912 1. What volume of such traffic moves in Maryland today?

2. Could the railroads adequately handle defense requirements for transportation of ammunition in time of war?

3. Is this legislation required to protect the people of Maryland against proven dangers?

4. How vital is transportation to defense needs?

"1. What volume of such traffic moves in Maryland today?

"In Aberdeen Proving Ground, Maryland has the largest and most important such installation in the world. The Chemical Arsenal at Edgewood is of comparable importance, and there are many other military installations which are essential to our defense effort.

"Last year over 81 million pounds of military munitions and explosives were shipped into or out of the State of Maryland by truck, and over 3 million pounds went through the State to and from places outside the State. In the transportation picture, as well as for many other reasons, Maryland is a key state. All North to South rail routes east of the Alleghanies go through Maryland. There are only two railroad bridges across the

4913 Potomac, while there are more than half a dozen highway crossings. Maryland stands straight across the eastern shore line transportation routes, and if by legislative act she should close the highway bridges to trucks carrying ammunitions and explosives she would be handing any enemy a major strategic victory. The

legislation could be repealed, but reactivation of the munitions trucking industry would take time and we might not have much to spare.

"The Department of Defense considers that defense is everybody's job. It is the business of this committee as well as the business of us in the Defense Department. Maryland has a real stake in defeating this legislation, both from the point of view of the important military installations in the State and from the point of view of national defense.

"2. Could the railroads adequately handle defense requirements for transportation of ammunition in time of war?

"In World War I and World War II, the capacity of our railroads was strained to the utmost by military requirements. You will all remember the shortage of boxcars, delays in shipment, and inconvenience of travel. Transportation was a bottleneck limiting our fighting strength on many occasions during both wars. Trucks and air transport were used to the
4914 maximum, and still we had to live with unacceptable delays. Perhaps the railroads might have slack to take care of our present requirements, but it is certain that that slack would disappear if we became engaged in another war.

"3. Is this legislation required to protect the people of Maryland against proven dangers?

"The transport of ammunition and explosives in interstate commerce is subject to regulation of the Interstate Commerce Commission, and, in addition, the military departments of the Department of Defense have regulations designed to achieve safety that are even more restrictive in many respects than those of the Interstate Commerce Commission. The Department of Defense imposes such regulations on intrastate as well as interstate movements by truck. The Department of

Defense has secured the aid of other federal agencies in policing the transport of ammunition of truck. The safety record of the trucks engaged in this business is at least as good as that of any other means of transportation. Certainly the routes followed by the railroads are no farther from large concentrations of population than those of trucks. The major disasters from ammunition explosions have all occurred in connection with water transport.
4915 There is no record of highway calamities, death and damage, or of explosions wrecking state highways. In other words, there is no valid safety reason for this legislation.

"4. How vital is transportation to defense needs?

"If we lack an adequate transportation system, we might as well produce potatoes as bombs and shells. The importance of transportation was strikingly demonstrated in the closing years of World War II. Before the dust had cleared over Germany, the United States sent a distinguished committee to Europe to evaluate the results of our bombing on the European continent. The result of its study was published in the U. S. Strategic Bombing Survey, September 30, 1945. Air power contributed to the victory in many ways, but nowhere as effectively as in the attack on transportation. The following is quoted from page 12 of the summary report: 'The attack on transportation was the decisive blow that completely disorganized the German economy. It reduced war production in all categories and made it difficult to move what was produced to the front. The attack also limited the tactical mobility of the German army.'

"The lessons we learned in World War II were also learned by other nations. If war should come, we must be prepared for an attack on our transportation
4916 system, and at that time all elements of the transportation system must be available to us. The passage of Senate Bill No. 236 would have a direct effect in weakening our transportation system.

"For all of the foregoing reasons, the Department of Defense asks that Senate Bill No. 236 be not favorably considered."

BY MR. LAYNE:

Q. Was Senate Bill 236 enacted by the Maryland State Legislature?

A. It was not.

Q. Were any of the bills, Plaintiff's 141 through 164, enacted by any of the State Legislatures?

A. To my knowledge there was not one of the bills enacted. There were some of the bills reported out, but to my knowledge, none were enacted.

MR. BALL: If the Court please, now that that fact is here, we move to strike the testimony because it clearly shows that nothing happened out of this Act.

THE COURT: Overruled.

MR. LAYNE: No further questions.

* * *

CROSS EXAMINATION OF MR. PERRIN

BY MR. BALL:

* * *

5021 Q. Now, when you went to the Legislature of Maryland in 1955, you knew that the 5 thousand pound bills were being sponsored by the railroad brotherhoods, didn't you, Mr. Perrin?

A. The progress of the bill, of every place where I testified, indicated that they were sponsored by the brotherhoods; that is right.

* * *

REDIRECT EXAMINATION OF PERRIN

BY MR. LAYNE:

* * *

5085 Q. Let me ask you, Mr. Perrin:

In addition to the Department of Defense in the State of Nebraska, did any other Government Agency oppose the 5,000 pound bills?

A. Yes. The Defense Transport Administration did.

* * *

5112 BY MR. LAYNE:

Q. Mr. Perrin, yesterday I asked you about the Defense Transport Administration. Do you know what the Defense Transport Administration is?

A. Yes, sir, it is an emergency agency set up under the Defense Production Act of 1950, which was to mobilize the transport efforts of the United States in the Korean emergency.

Q. Can you tell me whether or not you know if the Defense Trans-

5113 port Administration, through Mr. Owen Clarke, took a position with respect to the 5,000-pound bill in Nebraska?

A. Yes, they took a position by letter.

MR. BALL: May I ask the date and the year?

THE COURT: The date and the year, if you know, the approximate date and the year.

5114 BY MR. LAYNE:

Q. Will you look at Plaintiff's Exhibit 166 for identification. Would that refresh your recollection as to when this position was taken?

A. Yes. It was taken by letter on March 29, 1955, and addressed to the Chairman of Legislative Committee in Nebraska.

Q. Did they take a position in favor of or in opposition to the 5,000 pound bill?

A. They took a position in opposition to the bill, and that position was substantially the same as that taken --

THE COURT: All right. They took a position in opposition to the bill.

* * *

5124 MR. LAYNE: I would like to have marked as Plaintiff's Exhibit, for identification, No. 169 a letter or a memorandum for the record, dated 18 February 1953, signed by J. H. Nevins, Jr., Captain, United States Navy, Deputy Director.

MR. BALL: Do we have that?

MR. LAYNE: No, you do not.

THE DEPUTY CLERK: Exhibit No. 169, for identification.

(Document marked Plaintiff's Exhibit No. 169, for identification, memorandum dated 18 February 1953, signed by J. H. Nevins, Jr., Captain USN.)

THE COURT: Let me ask you this: Where was this obtained from?

5125 MR. LAYNE: This was obtained from the files of the various documents among those that Mr. Ball had yesterday and from the files of the Department of Defense.

THE COURT: Was this one of the documents that Mr. Ball used yesterday?

MR. LAYNE: No, Your Honor. It was one among that group but it was not one of those he marked.

THE COURT: All right.

Is that Captain Nevins?

MR. LAYNE: Yes, Your Honor; N-e-v-i-n-s.

(Counsel perusing the document.)

MR. SHEA: Has Your Honor had an opportunity to see that?

THE COURT: No.

(Document handed to the Court.)

THE COURT: All right.

BY MR. LAYNE:

Q. Mr. Perrin, can you tell the jury whether or not there was a meeting in the Department of Defense that you attended on February 18, 1953, with respect to the 5,000 pound bill?

A. Yes, sir.

Q. I would like you to take a look -- Can you tell us who was present at the meeting?

5126 A. The general counsel of the Office of Secretary of Defense, Mr. Roger Kent --

MR. McGLOTHLIN: May I ask whether the witness is testifying from his recollection?

THE COURT: Let us find out.

Are you testifying from your own recollection or do you have to refer to that memorandum?

THE WITNESS: I have to refer to the memorandum. I can't remember all the names of those people.

THE COURT: Let me ask you a question: Do you have any independent recollection without referring to the letter dated February 18, 1953, as to the names of the persons who were present at that meeting?

THE WITNESS: I do not.

THE COURT: Do you have to refer to that letter --

THE WITNESS: I have to refer to the letter.

THE COURT: Just a minute. I want to say this for the record.

I want to find out what your recollection is first.

Do you have to refer to that letter in order to determine who were present besides yourself?

THE WITNESS: I certainly do.

THE COURT: All right. You may proceed.

5127 THE WITNESS: Those present at the meeting were general counsel of the Office of Secretary of Defense, Mr. Roger Kent; and legislative liason officer for the Office of the Secretary, Rear Admiral Harold Houser; and the director of the Military Traffic Service, Mr. Kenneth Vore; and the military deputy to the director, Captain Joseph Nevins; and myself.

Q. Now, Mr. Perrin, can you tell me whether or not you received instructions at that meeting as to the action to be taken by you?

A. I did.

MR. McGLOTHLIN: If Your Honor please, can you have him first ask what he remembers and then have him read if he has to refresh his recollection?

THE COURT: All right.

MR. McGLOTHLIN: Because he didn't write this memorandum, Your Honor.

THE COURT: I understand. You want him to testify what he remembers?

MR. McGLOTHLIN: I want to know what he knows. I thought it was improper for him to use it.

THE COURT: All right.

BY MR. LAYNE:

Q. Mr. Perrin, tell the jury what you can independently recollect, without looking at that memorandum, concerning the meeting of

5128 February 18, 1953.

A. Well, actually I remember that the policy of handling this legislative matter was determined at that meeting and it was primarily --

MR. GATES: May it please the Court, I don't object to this

witness testifying to facts but I do think it is improper for him to be saying as a conclusory matter the policy of the Defense Department was raised at this meeting.

THE COURT: Well, the only way I can see to do that is for him to testify what was said there.

MR. GATES: That is correct.

THE COURT: All right. Suppose you do that.

MR. GATES: That is equally objectionable, if the Court please.

THE COURT: Well, one attorney makes one request and another attorney makes another one. I want to find out where we are. To use an old expression, "Where are we at?"

All right. Let us find out where we are now.

MR. BALL: If the Court please, I suggest we find out if the witness remembers whether he received instructions.

THE COURT: All right.

Did you receive certain instructions?

THE WITNESS: I did.

5129 THE COURT: And what did you do pursuant to those instructions?

That is what you want to develop, isn't it?

MR. LAYNE: That is exactly it.

THE WITNESS: When I received information from the military installation that there had been a bill introduced in one of the states, I took the matter up with the legislative liason officer for the Secretary of Defense, Admiral Houser; and Admiral Houser immediately would --

MR. McGLOTHLIN: Your Honor, the question is what did he do.

THE COURT: Yes. Coming back to what I originally stated, it may be necessary for you to state now if you go into what Admiral Houser said -- You can't testify what he told you, but acting on certain information you received, you are permitted to say what you did.

THE WITNESS: I'll leave it this way: I took the matter up with

Admiral Houser. When he told me that his source --

THE COURT: All right. The jury will disregard that.

He told you certain things, correct?

THE WITNESS: Sir, I am trying to tell you the procedure by which these things were handled in the Department of Defense. I testified
5130 on cross-examination to this a number of times and on direct examination; and I think that it is--

THE COURT: Was this developed on cross-examination?

MR. LAYNE: Yes.

THE WITNESS: It certainly was.

THE COURT: All right. If that was developed on cross-examination, you may go ahead.

THE WITNESS: The procedure by which this was handled by myself was to advise the legislative liason representing the Office of the Secretary of Defense. When he told me that he had exhausted every remedy that he could, we immediately made arrangements to appear in a state in opposition to these bills wherever they were introduced. And from my own knowledge, there were bills introduced in at least 15 states, 15 to 18 states, and I had to --

MR. SHEA: If the Court please, this man is just volunterring all over the lot.

THE COURT: I understand.

MR. SHEA: And he knows that it's improper.

THE COURT: Well, if this was gone into on cross-examination and was developed --

MR. BALL: All that I developed as far as other states than Maryland is to which states he appeared, and there were just two other states.

5131 THE COURT: All right. Counsel may go into that.

BY MR. LAYNE:

Q. Did you appear in other states, Mr. Perrin, other than

Maryland?

A. I did; Wisconsin and Nebraska.

Q. And that was subsequent to February 1953, subsequent to the meeting?

A. That is correct, yes.

* * *

5184 OBJECTIONS OF DEFENDANT 66

"Defendant 66 objects to the admission into evidence of each of the following exhibits on the grounds that:

"1. The facts that the document is offered to prove are irrelevant to any issue in the case relating to this defendant.

"2. The document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

"3. The document is not a declaration in furtherance of any

5185 conspiracy.

"Plaintiffs exhibits to which the foregoing objections are made by this defendant are the following: 170 - 182, inclusive."

THE COURT: Mr. Ailes.

MR. AILES: I want to be clear on what Mr. Layne said. He is offering them only against the Pennsylvania Railroad and the Association of Western Railways?

THE COURT: That is right.

Now, ladies and gentlemen of the jury, Mr. Layne has heretofore in connection with the so-called five thousand pound bill limited his offer of those bills to the defendant Association of Western Railways and the Pennsylvania Railroad.

He now offers in evidence certain documents identified by Mr. Ball, documents which were identified by Mr. Ball in his cross examination of Mr. Perrin yesterday.

I now instruct you that these documents are received only against

the defendants Association of Western Railways and the Pennsylvania Railroad and they should not be considered by you as against any other defendant.

(The documents previously marked for identification as Plaintiff's Exhibits 170 thru 182, respectively, were received in evidence.)

* * *

5275 "OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS.

"Plaintiff's Exhibit 184, (Document No. 52).

"These defendants object to the admission of this exhibit for all of the reasons set forth with respect to Plaintiff's Exhibits 49, 50, 66, and 68."

* * *

* * *

5325 (Objections of Defendants The Association of Western Railways and the individual Western Railroad Defendants are as follows:)

5326 "Plaintiff's Exhibit 187

"(Document No. 60-1)

"These defendants object to this exhibit for the reasons that the enclosed statement shows on its face that it was not prepared by any defendant, is hearsay as to these defendants, contains incompetent opinions of fact and opinions of law, and is not identified as to author, source, or authenticity."

* * *

41 Q. Now, addressing yourself to the kind of traffic for which railroads compete with motor carriers, did you have any policy of dividing that traffic in any particular way?

A. Let me think. I don't recall what policy we followed. There were many, many times though on big movements that we deliberately -- rates and services being equal -- split movements up between modes of transportation. If we had some tremendous big piece-goods movement or something like that, or movement between manufacturing or weaving plants and finishing plants, and that sort of business, lots of times we split that between modes of transportation.

Q. Your remarks to this point have been addressed to all kinds of traffic I take it?

A. I beg your pardon?

Q. You have been talking about all kinds of traffic? A. Yes.

Q. Was the situation any different with respect to ammunition and explosives traffic? A. No, I don't think so.

42 Q. The same policies applied to that as applied to piece goods or anything else?

A. Yes. Yes. You've got to consider all of the various elements in your whole transportation operation, service, cost, your requirement, the rate of flow that you have to have, and the size of units that you must have going into your production schedules. All those things have to be considered when you go to route that kind of traffic.

Q. Was there a formal policy which governed your routing in general terms? A. Price.

Q. Price? A. Yes.

Q. That was the main factor?

A. That was one of the main things you'd always look at.

Q. And what were the exceptions to giving it to the carrier with the lowest price? A. Service.

Q. Would that be whether the service was better or worse, or did it depend merely on the kind of service you wanted?

A. The kind we would have to have in a production and movement schedule generally. Generally speaking.

Q. It wouldn't necessarily mean that because one carrier could get

43 it there a day faster than the other that you'd select that carrier unless you had a particular need to get it there at that time?

A. If you had the need.

A. But only if you had the need?

A. As a rule, yes. You would use the carrier that gave you - - that would give you the nearest to what your customers say they need, the arsenals and the depots and so on.

Q. Did I understand you correctly to say that, in fact, where rail and motor carrier rates were equal you had divided traffic between the, but you didn't know of a policy that required you to do that?

A. I don't recall any specific policy on that.

* * *

5340 "OBJECTIONS.

"Defendants (11), (29) and (66) object to the admission into evidence of each of the following exhibits on the grounds that:

1. The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

2. The document is hearsay and is not an admission by an y party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

3. The document is not a declaration in furtherance of any conspiracy.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

184, 185, 186, 117-A.

"These defendants object to Plaintiff's Exhibit 117-A on the additional ground that the authenticity of the exhibit
5341 has not been established.

"J. H. McGlothlin,

"Attorney for Defendants 11, 29 and 66."

* * *

5387 MR. WRIGHT: Yes. All right. If you will mark the attached three page statement, please, as 187-A, for identification, and I will offer both 187 and 187-A in evidence.

THE COURT: Very well. Against whom are you offering them?

MR. WRIGHT: This offered against the AWR and the AAR.

THE COURT: All right. They will be received over objection.

* * *

5389 MR. WRIGHT: Now, I think the statement, the Defense Department statement, should be read, and I will ask Mr. Layne to read it, attached to this 187.

THE COURT: I think the Jury will be better able to remember when they hear both statements.

MR. SHEA: Your Honor, I wonder if it would be helpful to the Jury as they are listening to this, if Your Honor thought it was, you have instructed them to disregard all the hearsay aspects --

THE COURT: I told them that yesterday.

5390 MR. SHEA: I realize that, Your Honor, but what I am wondering is, do you think it might be helpful to them if you gave them -- they are going to pass on it -- I wonder if it would be helpful if you gave them some concrete notion of what is hearsay and what isn't. Do you think that might be helpful to them?

THE COURT: I think they know what hearsay is. If you are talking to one of the jurors out in the jury room, and you tell the jury, "I was talking to John Brown yesterday, and he told me that so-and-so was so-and-so, and they did this or that," that is hearsay -- something somebody else told you. Counsel, if he had that issue before him, couldn't examine you on the truthfulness of the statement because he would have no opportunity to cross-examine John Brown. I think the Jury knows.

MR. SHEA: That is so whether it appears in a letter or whether it is --

THE COURT: That is so whether it appears in a letter or appears in oral testimony.

MR. SHEA: Anything in here that they can see that is not of this man's own knowledge, but something he gets from someone else, should be disregarded.

THE COURT: That goes for any document -- that goes for the Governors' Conference document, or any document.

5391 MR. SHEA: And they are to fully disregard it.

THE COURT: And that is the reason the Jury has the right, power, privilege, and their duty, their function, to weigh the testimony -- give the various documents the weight you think it is entitled to. You may say to yourself, "I don't think it is entitled to any weight. It doesn't mean anything." That is your privilege and function.

All right.

MR. WRIGHT: Mr. Layne has called my attention to the part of the transcript in the Sub-84 proceeding in which this statement of the Governors' Conference that Mr. Ball introduced was read, and I think the statements made by Mr. Ball are somewhat different than the statements about the statement made by the man who introduced it, and I would like, at this time, to read this examination of the gentleman who introduced it in evidence in that proceeding, which shows what the basis of it was.

THE COURT: Which proceeding? The Sub-84?

MR. WRIGHT: Sub-84. We have had this entire record here all the time. When we put in the Examiner's Reports and the other material it was understood that the entire record would be available for anyone who wished to refer to it.

MR. BALL: If that is a statement of fact and you show it there, I
5392 will be very happy to stipulate --

THE COURT: Is that a statement of fact made by Mr. Ball?

MR. LAYNE: First, Your Honor, let me say I was there; I examined the man. This is not a statement of the Governor's Conference; it is a statement of the Executive Committee of the Governors' Conference. It was not prepared at Gatlinburg, Tennessee; it was prepared by the secretary. It was not acted on --

THE COURT: Well, let's don't get into --you see, that is the trouble. That is the reason we have to have rules of evidence, and we have to abide by them.

All right. Let's proceed with the reading of the statement. I think we have gone far enough on this. The Jury understands what is being done, I'm sure.

(Mr. Layne reading Plaintiff's Exhibit Number 187-A.)

THE COURT: We will take the morning recess.

(Short recess.)

THE COURT: Bring the Jury in.

(The Jury was thereupon brought into the courtroom.)

MR. BALL: If the Court please --

THE COURT: Yes.

MR. BALL: I now move to strike the exhibit that has just been read by Plaintiff on the ground that it is apparent that it is replete with opinions as to the law on matters that were within the primary and ex-
5393 clusive jurisdiction of the Interstate Commerce, and opinions about the law in this statement that are contrary to the result reached by the Interstate Commerce Commission.

THE COURT: I will deny the motion.

* * *

5546 "OBJECTIONS.

"Defendants 11, 29 and 66 object to the admission into evidence of each of the following exhibits on the grounds that:

1. The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

2. The document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

3. The document is not a declaration in furtherance of any conspiracy.

4. The facts that the document is offered to prove are immaterial to any issue in the case relating to these defendants.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

5547 116-B, 117, 117-A, 127, 127-A, 187 and 187-A.

"J. H. McGlothlin,

"Attorney for defendants 11, 29 and 66."

"OBJECTION

"Defendants 11, 29 and 66 object to the admission into evidence of each of the following exhibits on the grounds that:

1. The exhibit is not evidence, but simply argument in graph form.

2. The exhibits are inaccurate and misleading and highly prejudicial.

3. The exhibits are hearsay and are not an admission by any party, or business records of any party, or otherwise outside the rule against admission of hearsay.

4. The exhibits are not supported by competent evidence, and distort the record in the case.

5. No evidentiary foundation has been laid for the admission of the exhibits, and no basis laid to establish their accuracy.

"Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

188, 189, 190, 191.

"J. H. McGlothlin,

"Attorney for Defendants 11, 29 & 66.

* * *

5678-E BY MR. WRIGHT:

And I would now like to re-offer at this time the reprint of the Ties article which was found in the C. & O. files. It was identified, I believed, at that time as Plaintiff's Exhibit 55, and I think the ruling

5679 was reserved on the question of whether or not a proper foundation has been laid. I submit, Your Honor, that there is now a proper foundation.

I want to re-offer it. The copy I have -- I haven't been able to locate the actual copy that the clerk marked but this is the same. It was photostated. It is the same thing, and I will ask to have this remarked and I will offer it.

MR. SHEA: Now, if the Court please, the reasons for excluding that earlier are reinforced, it seems to me, by this affidavit.

In the first place, there is no showing on this record, and the affidavit makes no showing, that this particular document was received by C. & O., that it was sent to C. & O. by anyone, in the Southern Railway. The affidavit says that primarily they distributed it to their own employees and former employees, that if someone asked for a copy, so long as they had copies available they would give it to them. Now, that certainly would not justify the introduction of this on any possible basis of relevance. If it came, and this is pure speculation as to whether it came to them on the basis of a request, which was answered by sending a copy. And Mr. Young states that the only distribution was either to their own mailing list of employees or former employees or in response to a request. So that the evidence which Mr. Wright has now introduced establishes
5680 that this was never sent out as a part of any publicity campaign aimed at defaming anyone.

Furthermore, as I said, Your Honor, it still remains speculative as to where this particular copy came from. Mr. Wright would like to infer, I take it, from the affidavit, that it came from Southern because, according to Mr. Young's affidavit, they would send a copy so long as they lasted to anyone who requested it. But that does not establish how this copy came. But it does establish if it came in that way it is obviously irrelevant to any issue in this case; because, if you accept this affidavit, the only persons to whom it was sent was the mailing list of employees and persons who actually wrote in and asked for copies, and it was no part of any campaign, of any kind, obviously no inference can be drawn from the fact that a copy has been found in the C. & O. files.

So it seems to me Your Honor has every reason for reaffirming your prior decision of excluding it.

THE COURT: Let's hear the purpose for which it is being offered, Mr. Wright. Have you stated the purpose?

MR. WRIGHT: Yes. If the Court please, we think the presence of this reprint in the C. & O. files, which is admitted, is significant for this reason: Now it has now been established that this article was reprinted in quantity. There is nothing in Mr. Young's affidavit that suggests that
5681 they reprint in quantity every article that is published in Ties. There is nothing in it that suggests that this particular article was reprinted in quantity and distributed to those who wanted it because of some demand for the article by a Southern employee. We have now traced this article, not only into this reprint, in reprint form, not only into the C. & O., but it has also appeared in the material that was circulated by the AWR.

Now we think it is quite clear from Mr. Young's affidavit, read critically as an admission, that the purpose of that reprint, the reason why this was put in reprint form in quantity, and handed out to anybody who requested it, in this reprint form, was because it was to be used as a part of this campaign.

I might say we also turned it up in a slightly changed form in the Pennsylvania files in that article from the P. T. News, which had many --

MR. SHEA: Your Honor, this testimony now by Mr. Wright will --

THE COURT: The question as to whether or not there is evidence in the case that can support this exhibit, if I admit it in evidence, or the weight that the jury will give to the exhibit, that is a matter for the jury to determine.

MR. WRIGHT: The fact that it turned up in the C. & O. files,
5682 we think, is evidence that not only was it intended to be used as a part of the campaign that the Western railroads carried on, where it did appear, but it was also intended to be made available to and was made available to the Eastern railroads, specifically the C. & O., for a similar purpose.

MR. SHEA: Your Honor, may I respond?

In the first place, Mr. Wright is not at all careful about his representation as to what this affidavit said. If you will read the affidavit, you will find nothing in it to suggest that this was reprinted in quantity. He is taking remarkable liberties with the record, and, I think, unfair. All this affidavit says is, we often have requests for reprints of particular articles and where possible we comply with those requests and reprints of the article so long as the supply lasted were furnished upon request. Distribution of the magazine through its regular mailing list and reprints in response to such requests were the only distribution of this article made of participated in by Southern Railroad Company.

Now, Your Honor, Mr. Wright is suggesting that if something is found in my file, or something is found in the files of one of the members of the jury, that this evidences that somehow or other there is a connection between the person in whose files it is found and whoever printed this. Well,
5683 if this can be the basis for inference -- it apparently is the basis on which Mr. Wright would try to hold the Southern Railway -- if this can be the basis of inference, any of us can be convicted of anything.

THE COURT: At the proper time you will have an opportunity to argue what you think the evidence will show, Mr. Wright.

At this time the Court will admit Plaintiff's Exhibit 55, and will tell the jury again: Make up your own mind as to what weight, if any, you should give the exhibit.

(Plaintiff's Exhibit No. 55
was received in evidence.)

MR. BALL: I would like to move to strike out with reference to any campaign of AWR using this earlier; because the only document in which his reprints appeared, a set of reproductions proper, and could be picked up from all kinds of publications presenting both sides. The very nature of that negatives any idea of a campaign. For that reason I move to strike.

MR. WHEELER: I move to strike also, Your Honor, on the

ground, in addition to those that have been previously set forth, there is absolutely no statement at all in the affidavit that was read that mentions C. & O. in any way. C. & O. will be established publishing its magazine, for its employee publication, reprints articles from various magazines and newspapers from time to time. It obviously doesn't maintain a large enough
5684 staff to write fresh material for this magazine every month that it comes out. And there is no showing here that that isn't exactly what happened here. There is no showing as to how this got in to the C. & O. magazine. I just don't think that therefore there has been a proper foundation laid for introducing it.

THE COURT: Objection overruled.

* * *

5712 OBJECTIONS OF DEFENDANTS 11, 29, and 66

Defendants 11, 29 and 66 object to the admission into evidence of each of the following exhibits on the grounds that:

1 - The facts that the document is offered to prove are irrelevant to any issue in the case relating to these defendants.

2 - The document is hearsay and is not an admission by any party, or a business record of any party, or otherwise outside the rule against admission of hearsay.

3 - The document is not a declaration in furtherance of any conspiracy.

4 - As to Plaintiff's Exhibits 192 and 193, on the further ground that the author of the documents, Lewin W. Wickes, Jr., was not examined touching the same during his examination as a witness on behalf of the plaintiff.

5712A Plaintiff's exhibits to which the foregoing objections are made by these defendants are the following:

192, 193, 194, 195, 197, 197A.

(Signed by) James H. McGlothlin, Attorney for Defendants 11, 29, and 66.

* * *

5748 BY MR. FLYNN:

"OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

"Plaintiff's Exhibits 117 and 117A

"These defendants object to the admission of these exhibits on the following grounds:

"1. That said documents are hearsay, and hearsay of hearsay, and are not binding upon any of these defendants.

"2. That Plaintiff's Exhibit 117 states the conclusion of the writer thereof as to what others were going to do or had in mind.

"3. That there is no competent evidence in this record that Plaintiff's Exhibit 117A was at any time authorized by any official of the Defense Department having authority to do so, or that said document was in fact issued at any time by the Defense Department.

"4. That Plaintiff's Exhibit 117A contains arguments, statements of opinion, and statements of purported fact which are not competent evidence against any of these defendants.

5749 "5. That the deposition testimony of Colonel Edson does not point out what statements in Plaintiff's Exhibit 117A represent statements of policy officially adopted by the Defense Department, and what statements are statements of fact and argument.

"6. That the arguments asserted in Plaintiff's Exhibit 117 and the position therein announced are not competent evidence to prove or disprove the truth or falsity of any publicity issued by any defendant.

"7. That the statements of purported fact contained in Plaintiff's Exhibit 117A, the authorship of which has not

been established, are incompetent as hearsay to prove or disprove the truth or falsity of any publicity issued by any of these defendants.

"8. That Plaintiff's Exhibit 117A is not competent evidence as to the existence or non-existence of a lawful motive on the part of any defendant.

"9. That Plaintiff's Exhibit 117A contains inflammatory and prejudicial assertions reflecting upon the patriotism of anyone who possessed a different opinion than the purported author of said document.

"10. That Plaintiff's Exhibit 117A shows on its face that it was directed toward a statement of the Executive Committee of the Governors' Conference, and it has been
5750 admitted by the plaintiff that the Executive Committee of the Governors' Conference is neither a co-conspirator nor the agent of any defendant in the carrying out of any conspiracy.

"11. That Plaintiff's Exhibit 117A is confusing and misleading, and its meaning and purport has not been properly explained in evidence."

"OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

"Plaintiff's Exhibits 127 and 127A

"These defendants object to the admission of these exhibits for all of the reasons stated with respect to Plaintiff's Exhibits 117 and 117A."

"OBJECTIONS OF DEFENDANTS THE ASSOCIATION OF WESTERN RAILWAYS AND THE INDIVIDUAL WESTERN RAILROAD DEFENDANTS

"Plaintiff's Exhibits 187 and 187A

"These defendants object to the admission of these exhibits for all of the reasons stated with respect to Plaintiff's Exhibits 117 and 117A."

* * *

5824 THE COURT: All right, thank you, Mr. Ailes.

MR. WRIGHT: We will have this marked. We will find the other one. Just put a temporary number on it.

5825 MR. AILES: I assume you can give me another one.

MR. WRIGHT: I am going to give you this back.

THE COURT: Do you have a spare copy?

MR. RHOADS: Yes, sir.

MR. WRIGHT: I had it marked with the same number, the copy that was just handed to me by Mr. Ailes.

BY MR. WRIGHT:

Q. I will ask you to examine that and tell us if that is a copy of the copy of the minutes of the meeting you examined?

A. Yes, it is.

Q. Now, did you observe the item under the first paragraph there, under the heading one, Rates on Ammunition and Explosives?

A. Yes.

MR. WRIGHT: If the Court please, this entire document was read to the jury yesterday. I don't know whether, for clarity, you would like to have him read this part he is going to refer to, again, or whether you wish me to just ask the questions.

THE COURT: You may ask the question and see how far we get without reading it.

BY MR. WRIGHT:

Q. I want to ask you, Mr. Hummer, if you could tell us in your own words, what that proposal of the Defense Department was which is referred

5826 to in the first paragraph there, with respect to level of rates?

A. They asked for a general level of rates on ammunition and explosives which would reflect 55 per cent of the applicable first class rate, carload minimum weight 50,000 pounds; alternating with 40 per cent of the applicable first class rates, carload minimum weight 80,000 pounds.

That means whichever basis resulted in the lower total charge would apply.

MR. WRIGHT: I think it might help if I wrote those down on the board.

THE COURT: All right.

BY MR. WRIGHT:

Q. Now, that proposal of the Army, or, rather, of the Defense Department was to apply in what territory?

A. Eastern, Southern, and Western territory. That would include the whole country.

Q. This was to apply in the Eastern, Southern and Western territory.

Now, the proposal was what, again?

A. Fifty-five per cent of the applicable first class rate, carload minimum weight of 50,000 pounds.

Q. That is in a carload minimum of 50,000 pounds?

A. 50,000 pounds.

Q. Now then, there was more. You said part of the proposal.

5827 What was the rest of it?

A. Or 40 per cent of the applicable first class rates, carload minimum weight 80,000 pounds.

Q. Now, can you tell us just what that 55 per cent figure means in terms of a given first class rate, that is, first class rates between, comparing points of $1.00, what would that mean?

A. Between two points, where the first class rate is $1.00, the 55 per cent basis would be 55 cents; the 40 per cent basis would be 40 cents, per 100 pounds.

Q. If the first class rate is at $1.00 per hundred weight?

A. That is right.

Q. Now, will you tell me how you compute the rate, let us say, first, on a carload of 50,000 pounds?

A. 50,000 pounds, being the minimum weight on which the 55 per cent basis would apply, you simply, 50,000 pounds equals 500 hundred weight, and you multiply that by 55, or $275 would be the charge for the car between those two points.

Q. So the 50,000 pounds, then, would move at a cost of $275?

A. That is right.

Q. Then if you had 60,000 pounds.

A. Well, you would still, since that exceeds the 50,000 minimum,
5828 you would still use the actual weight of 60,000 pounds, or 600 hundred weight times 55 or $330.

But you would have to alternate that with the other basis.

Q. Well, what do you mean by the other basis?

A. 40 per cent on a minimum of 80,000 pounds. If you had 80,000 pounds at 40 cents, you would have a $320 charge. So that that is lower than the 55 cents at 60,000 pounds so the $320 charge would apply.

Q. So that is the rate at which this shipment of 60,000 pounds would move, then, would be $320, would be the charge for that?

A. It would be billed at 60,000, as 80,000, at 40 cents.

Q. $320 would be what was paid?

A. That is right.

Q. Now, for 70,000 pounds?

A. 70,000, at 55, still exceeds the $320, so the charge would still be $320 for 70,000 pounds.

Q. Then at 90,000 pounds, what would it be?

A. It would be 900 hundred weight times 40 cents or $360. Naturally, the 55 at 90,000 would still be higher.

Q. Then 100,000 pounds would be $400?

A. $400.

Q. Now, I believe you will notice the second paragraph says that
5829 this proposal of the Defense Department was not approved.

A. It was not approved; that is right.

Q. Now then, there follows, does there not, a series of --

MR. GATES: I don't mind, under the circumstances, Mr. Wright moving along this way, but the communication says it was recommended that it be not approved, not that it was not approved.

THE COURT: All right. Use the language in the exhibit.

BY MR. WRIGHT:

Q. It says: Following discussion, it was recommended that the proposal by the Department of the Army be not approved and in lieu thereof the following bases were recommended.

What I want to call your attention to now, Mr. Hummer, are the bases that were recommended, and, first, I want to ask you about what was recommended within the Eastern territory, and for that purpose, I would like to have this map, Exhibit 2, put up.

Your Honor, what I wanted to do was to outline on the map, Exhibit 2, the particular territory where each of these proposals applied, and it would help if Mr. Layne or someone else could do that, and then I could stand back here and ask the questions.

5830 THE COURT: All right, Mr. Layne, you may do that.

MR. LAYNE: Thank you, Your Honor.

BY MR. WRIGHT:

Q. Now, Mr. Hummer, I am calling your attention specifically to the first proposal on page 2 there. Does that contain the proposal as to what was to be done in the east?

A. What was recommended in the east, yes.

Q. Excuse me. What was recommended.

THE COURT: Is this by the Defense Department?

THE WITNESS: No; by the railroads.

MR. WRIGHT: This is a railroad recommendation in lieu of the Defense Department.

THE COURT: I just wanted the witness to clear that up for the jury. I understand it.

THE WITNESS: We have just been talking about what the Defense Department has asked for. Now, this is what the railroads recommended.

THE COURT: All right.

BY MR. WRIGHT:

Q. Now, would you first read there what it says opposite that first proposal, at page 2?

A. First, within Official Territory, including extended zone C and Northern Illinois.

5831 Q. Now, could you indicate, so that Mr. Layne can outline it on the map, what that territory is that is referred to there?

A. Beginning with the Atlantic Coast, and with the bottom black line, and north of that line and west of the Atlantic Coast, as far as that line, all the way through the Mississippi River, now up the lefthand line there, which is the Western boundary of the State of Illinois; and right on up, and up that little portion of Wisconsin, and on up, including the lower Peninsula of Michigan; and then along the International Boundary to the Atlantic Coast.

THE COURT: Mr. Hummer, will you try to speak a little bit louder. We want you to be conscious of the reporter all the time, and also the jury, of course.

MR. McGLOTHLIN: Your Honor, may I ask Mr. Wright something? He mentioned extended Zone C. Would you ask the witness where that is?

BY MR. WRIGHT:

Q. Which part of that is extended Zone C?

A. I believe extended Zone C is including a little more of Wisconsin than that section shown on the map. It is a narrow strip up there in Wisconsin and goes to Lake Michigan.

MR. WRIGHT: I would like to have marked on the map with a colored line, if we can, the territory as described so we will have it permanently on Exhibit 2 for future reference.

5832 THE COURT: All right.

MR. GATES: Mr. Wright, are you going to mark on there Extended Zone C, or is he going to mark on there just Official Territory?

MR. WRIGHT: All that we are interested in showing is the area where this particular, where this particular rate was proposed. Now, we want the outside limits. We don't care about Extended Zone C or what they term the interior parts of the area.

All I want to do is to indicate the outer limits of the area where this proposal applied.

THE COURT: All right.

MR. GATES: May it please the Court, is there any reason why the witness should not make this?

THE COURT: I was going to suggest that. Maybe the witness should. He can step down and make it.

MR. LAYNE: I would like him to.

THE COURT: I think the witness can do it.

MR. WRIGHT: All right.

THE WITNESS: Well, I would have to say that right offhand I don't remember the exact boundaries of that line. I think what I have described is about as far as I can say. It is a narrow strip along the eastern end of Wisconsin.

5833 BY MR. WRIGHT:

Q. I am not concerned about the particular interior zone. What I want to do, Mr. Hummer, is to establish the outer limits of the area in which this rate proposal was applied.

A. It does apply in the entire area I outlined, but there is a little additional territory in Wisconsin, north of that little section in Illinois, that is part of Extended Zone C, and I can't tell you exactly the additional zone or territory that that is in.

Q. Well, excuse me. I am trying to get at what you mean by additional. That would be territory up above this line?

A. That is right.

Q. North of Milwaukee, there? There will be some additional territory --

MR. GATES: Your Honor, I object to the leading of the witness by Mr. Wright. I think that you have asked him to outline it, and then you are proceeding to tell him where it is.

THE COURT: All right. Just a minute. I will sustain the objection on the ground of leading.

Ask the witness to exhaust his recollection and let him state the boundaries if he can.

Why don't you use the pointer, Mr. Hummer. You can use it from where you are seated, I think.

5834 THE WITNESS: It is a small amount of territory up in there (indicating).

BY MR. WRIGHT:

Q. Well now, otherwise, would you indicate with the pointer what the boundaries are of this proposal that you are about to tell us about, where it was to operate?

A. The Atlantic Coast, from the northern tip of Maine, down to Norfolk, Virginia, and along this line, which is the line of the Norfolk & Western Railroad; along this line, which is the Ohio River, until it joins the Mississippi; and then the Mississippi River, and then along the whole boundary of the State of Illinois, across the northern boundary of Illinois; and then up in to Wisconsin, and then, as I say, some additional territory there in Wisconsin;

And then following around, including the lower Peninsula of Michigan; and then following the boundary between United States and Canada; and on up to the starting point.

Q. Now, the proposal itself that was to apply within that territory you just outlined, was what?

A. 45 per cent of the Docket 28-300 scale, subject to an Ex Parte 175 increase, carload minimum weight, 40,000 pounds, plus 80 per cent of the 45 per cent of the same scale with the same increase, for the weight in the same 5835 car in excess of 40,000 pounds.

MR. WRIGHT: Now, if the Court please, what I propose to do was to chart these proposals, territory by territory, here, so that they could be compared with the rejected Defense Department proposal, and that would necessitate,

I think, using another chart. The problem is to keep the maps and that data and what I put on the chart in view all at the same time.

Now, I will be glad to set that up anywhere that is most convenient.

THE COURT: You set it up any way that you think you can use it.

MR. WRIGHT: Perhaps over here might be best.

MR. BALL: If the Court please, I am wondering if one of those can be placed over there where all counsel can see it, and the jury.

THE COURT: All right. How about that?

MR. WRIGHT: The only problem is the comparison I want to make between this and that. We can put it over there and I will go over there, or we can put it anywhere you say.

THE COURT: Just so all the attorneys can see it, and the jury.

MR. LAYNE: I can move over here. I will move out of the way,

5836 Your Honor, and they can use this table.

THE COURT: Some of you can move up over to this table.

BY MR. WRIGHT:

Q. Now, this railroad proposal in the Eastern Territory you outlined in Exhibit 2 there, was what?

A. 45 per cent.

Q. Yes.

A. Of the Docket 28-300 scale.

THE COURT: I am going to interrupt as we go along and try to get the witness, if he can, to use layman's language and tell us what he means by Docket 28-300 scale, unless you are going to develop that yourself.

MR. WRIGHT: I think this is a good point to do it.

THE COURT: I think you ought to try to simplify this in layman's language, so the jury will be able to follow you better, and the Court, and I know a lot of the lawyers are experts in this field, and maybe they don't need it.

BY MR. WRIGHT:

Q. What do you mean by Docket 28-300?

A. Some years ago the Interstate Commerce Commission instituted a general investigation of class rates throughout all territory east of the Rocky Mountains. That was docketed as Docket 28-300. The result of that case was the proscription of a maximum basis of rates in the form of a scale, that is, for certain miles, a certain first class rate would apply.

5837 Now, this is the scale that they are referring to.

Q. Maybe we can simplify the problem this way: Was that Docket 28-300 scale, whatever it was, also applicable to this proposal of the Defense Department here?

A. At the time of this meeting of September 28, 1955, those rates were applicable. So that is the same basis, the same scale that the Defense Department was asking for.

Q. The applicable scale there is over here, then, too.

Now, go ahead from there.

A. The next thing they say is: Subject to Ex Parte 175 increase.

Ex Parte 175 was another Commission proceeding which I referred to before, as having participated in, wherein the Commission allowed the railroads to increase their rates by 15 per cent, their class rates, with certain exceptions on certain commodities.

THE COURT: Now, will you explain to the jury what you mean by Ex Parte?

THE WITNESS: Well, it is a series of dockets where the Commission, itself, has instituted an investigation on response, usually, to a request by the railroads, and it is not a complaint and answer case, but it is simply a case where all parties can come in and bring in their evidence.

5838 THE COURT: All right.

BY MR. WRIGHT:

Q. Now, was that Ex Parte 175 increase, whatever it was, also applicable to the Defense Department proposal over here?

A. Yes, it was; that was the applicable basis.

Q. Now, what is the rest of it?

A. Now, that is on the carload minimum weight of 40,000 pounds.

Q. That is the minimum carload of 40,000 pounds. Now, was there more to it than that?

A. Yes, in weight, in the same car, exceeding 40,000 pounds would be subject to a lower basis, 80 per cent of this 45 per cent, which would be 36 per cent.

Q. 80 per cent of 45 per cent, or 36 per cent, and that applied to what?

A. To the same first class rate which is obtained from that 28-300 scale.

Q. To what?

A. That applies on the excess in the car over 40,000 pounds.

Q. The excess in the car over 40,000 pounds.

Now, could you, Mr. Hummer, make the same deduction if the first class rates were $1.00 per hundred pounds, and can you show me how you compute the charges on shipments of the same size as those we have over here, starting with 50,000 pounds?

5839 A. On 50,000 pounds, you would first compute the charges on 40,000 pounds at 45 cents.

Q. You would multiply 45 times 400?

A. That is right.

5840 Q. That gives you what?

A. $180.00. Then for the excess ten thousand pounds would make fifty thousand, you would apply 36 cents, or $36.00, for ten thousand pounds.

Q. And that would give you a total for the shipment of what?

A. $216.00.

(Mr. Wright indicating same on the blackboard.)

BY MR. WRIGHT:

Q. And on the fifty thousand pound shipment the figure $216.00 would be comparable to the $275.00 figure over here on the Defense Department proposal?

A. That would be the comparable charge.

Q. Can you do it for sixty thousand pounds?

A. You still have your $180.00 for your first forty thousand, and 36 cents on the extra twenty thousand, or $72.00.

Q. You just add $36.00 more; is that right?

A. $36.00 more; that's right.

Q. And that gives you a total of what?

A. $252.00.

Q. For the sixty thousand pound shipment that would be comparable to the Defense Department proposal of $320.00 for sixty thousand pounds over here?

A. Yes.

5841 Q. Can you do it for seventy thousand?

A. That would be $36.00 more for the additional ten thousand pounds.

Q. And that would be how much?

A. $288.00.

Q. That again is comparable with the $320.00 figure here?

A. That's right.

Q. When you get to eighty thousand pounds, that would be --

A. $36.00 more.

Q. Would be how much?

A. $324.00.

Q. That would be $4.00 more than the Defense Department proposal on eighty thousand?

A. That's right.

Q. And then for ninety thousand pounds you have what?

A. Add $36.00 again, $360.00.

Q. And at that point it would be precisely the same as the Defense Department proposal?

A. That's right.

Q. And when you get to a hundred thousand pounds --

A. Would be $36.00 more, or $396.00.

Q. At that point you go slightly under the --

5842 A. $4.00 less than the Defense Department proposal.

Q. MR. WRIGHT: I would like to do the same thing, if your Honor please, for western territory and eastern territory. I would like to have them all available for comparison at the same time.

THE COURT: All right.

(Mr. Wright writing on a new chart "Railroads' Proposal, Western Territory.")

BY MR. WRIGHT:

Q. Now, would you look at the next item there and tell me what the proposals of the railroads were in the western territory?

A. "2. Within Pacific Coast territory --" is that what you want? The next item?

Q. Yes. Again, Mr. Hummer, if you will, I would like to have you point out on this Exhibit 2 here exactly where these territories are that are referred to in the document in front of you.

A. Within Pacific Coast territory, Salt Lake City, Utah, and west. Here is Salt Lake City here. (Indicating.) Now, it doesn't define the line, but generally it is the line running north and south through Salt Lake City.

Q. In that area. Now, what was proposed to be done in that area you described.

5843 A. 55 percent of the applicable first class rate subject to ex parte 175 increase, minimum weight 60 thousand pounds.

MR. SHEA: If the Court please, Mr. Wright, I think, is taking liberties here in the designations he is putting on the top of these charts.

As I read the second paragraph in this exhibit it says, "Unless otherwise indicated the actions shown hereafter are the separate actions of the eastern, western and southern routes." So I suppose, to be accurate, that would have to be not "Railroads' Proposals," but separate proposals of respective groups of railroads.

THE COURT: Do you agree to that, Mr. Wright?

MR. WRIGHT: If he prefers to have it "Eastern Railroads' Proposals," that is perfectly agreeable.

MR. SHEA: Yes. That satisfies me.

(Mr. Wright indicated the above change on the charts.)

MR. WRIGHT: And that one, I suppose, should be named Western Railroads' Proposal.

BY MR. WRIGHT:

Q. Now, you were about to describe the rate that was proposed for this particular western area that you described.

That is 55 percent of --

5844 A. Of the applicable first class rate.

MR. GATES: Just a moment, please. The exhibit from which Mr. Hummer is testifying says that this is within Pacific Coast territory, Salt Lake City, Utah, and west. Now, this witness, so far as I know, has not testified that Pacific Coast territory and Western territory are the same. If they are, that's all right.

THE COURT: Let's find out about that.

THE WITNESS: That is a part of the western territory. We come later to the other proposals as to other parts of western territory.

MR. GATES: Then could we have it indicated on this chart that Mr. Wright is drawing that this is Pacific coast territory we are talking about rather than western railroads?

MR. WRIGHT: I had intended, if the Court please, to put on this one chart all of these proposals that fell within the general area. There are a number of others he is going to follow with.

THE COURT: I will let you proceed and I will let counsel cross-examine.

BY MR. WRIGHT:

Q. That is 55 percent of --

A. Applicable first class rate.

Q. First class, subject to ex parte --

5845 A. Subject to ex parte 175 increase. Minimum weight 60,000 pounds.

Q. When you say applicable first class here, does that include this Docket 28-300 scale? Was that applicable in that particular territory?

A. No; that was applicable east of the Rocky Mountains, but this would be the same rate referred to by the Department of Defense because they also say applicable first class rates, and they did include the 175 increase.

Q. I see. Now, this is the far western territory that you described. Will you proceed to the next item there that shows what was done in the west?

A. To and from transcontinental territory on the one hand and all other territories except southern territory on the other.

Q. Can you point out on the map just what is being talked about there?

A. Transcontinental territory is used only in connection with rates to and from the west. It wouldn't be within any particular territory, and that is territory west of this line. (Indicating.) Down the extreme western edge of North and South Dakota, cutting over into Wyoming, bisecting Colorado and coming down through New Mexico to El Paso, Texas. Between points in that territory west of that line and all territories east of the line,

5846 except southern territory, which is this territory south of the eastern territory and east of the Mississippi River. So this proposal is between that territory and this, excluding southern.

Q. What was that proposal?

A. 55 percent of the present first class rates subject to ex parte 175 increase, minimum weight sixty thousand pounds.

Q. That was 55 percent -- what was that again?

A. Present -- that would mean the same is applicable, so you have the same as above.

Q. Subject to ex parte, same minimum?

A. Same minimum, yes.

Q. The first one was called Pacific Coast?

A. Pacific Coast territory, Salt Lake City, Utah, and west.

Q. And that next one was Intercontinental to --

A. Transcontinental.

Q. Transcontinental, excuse me.

A. Between Transcontinental and all other territories except southern.

(Mr. Wright indicating on the chart.)

Q. Between Transcontinental and all other territories except southern.

5847 What is the next one you have there in the west?

A. Within and between western trunklines and southwestern freight bureau territories, and between those territories on the one hand and official territory on the other.

Q. Can you outline those territories you just referred to on that Exhibit 2?

MR. McGLOTHLIN: Your Honor, before the witness starts, I think the written record would be clearer if, instead of saying "this line, here to there," he would try to describe it in words so that we will have it preserved not only in the minds of the Jury by sight, but also on the record. I know it is hard to do.

THE COURT: All right.

THE WITNESS: Western trunkline territory includes the northern peninsular of Michigan, state of Wisconsin, state of Illinois -- I believe part of the state of Illinois -- then from -- as far as the Mississippi River on down to New Orleans.

No, I'm sorry. The Western trunkline territory comes down as far as St. Louis and then it comes across the state of Missouri, includes the northern part of the state of Missouri, and the state of Kansas, part of the state of Colorado, and up to this line previously described which is the western boundary of
5848 North and South Dakota and Nebraska. That would be the western trunkline territory.

Southwestern territory would be the territory south of that line, west of the Mississippi River, and up to this line formerly described cutting through New Mexico.

BY MR. WRIGHT:

Q. You are talking about applying within this territory --

A. It applies within western trunkline territory, within southwestern territory, between western trunkline and southwestern territory.

Q. You spoke too fast for me. Within western trunkline territory, and then the next one --

A. Within southwestern territory.

Q. And then what is the rest of it?

A. Between western trunkline territory and southwestern territory.

Q. Yes.

A. And between both southwestern and western trunkline territories on the one hand, and official territory on the other.

Q. Now, where is that official territory?

A. That is this territory previously described over here north of the Ohio River and East of the Mississippi River.

5849 MR. GATES: May we have the record show, Your Honor, he described the eastern territory, in effect.

THE COURT: What is that?

MR. GATES: I say, just for the record, so that we can have it down in writing, I think what the witness is really saying is the official territory and eastern territory is the same thing.

THE COURT: Do you understand that? Mr. Wright, do you understand Mr. Gate's suggestion?

MR. WRIGHT: I think they are both on the right. I didn't --

THE COURT: Will you state it again, Mr. Gates, and will you listen?

MR. GATES: Mr. Hummer is trying to be very helpful and I think, as Mr. McGlothlin pointed out a moment ago, it is very difficult, unless Mr. Hummer relates to specific rivers or boundaries, or states --

THE COURT: In other words, when he says "this" on the map, it doesn't mean anything in the record.

MR. GATES: That is correct, Your Honor.

Mr. Hummer just described for Mr. Wright, official territory, but he again said it is along this line over the eastern part of the United States.

THE COURT: Mr. Hummer, bear in mind the attorneys and the
5850 Court from time to time have to read this stenographic record, and that is not reflected in there. If you refer to a line, it doesn't mean anything, but if you call out what you mean, or state what you mean, it is reflected accurately in the record.

THE WITNESS: I think I said it was north of the Illinois River and east of the Mississippi River.

MR. GATES: I think, for the Jurors' benefit, Your Honor, too, it is also true that the eastern territory and official territory are one and the same thing.

Now, Mr. Hummer, a while ago, in answer to Proposition 1, described the eastern territory in some detail. Now we are talking about official territory; that is the same thing as eastern territory.

THE COURT: That is your understanding, isn't it?

THE WITNESS: The first territory we described was stated in this Report of Proceeding as within official territory, including and --

THE COURT: Mr. Hummer --

THE WITNESS: They are referring to the same official territory now as we did before.

THE COURT: The reporter wasn't getting part of what you said. Will you start over again?

MR. WRIGHT: Let me put that on here so we will have it.

5851 THE WITNESS: That will make it clear if he marks that "official" instead of "eastern."

BY MR. WRIGHT:

Q. It says "within official territory"?

A. Including extended Zone C and northern Illinois.

Q. Including what?

A. Extended Zone C.

Q. That Extended Zone C was what?

A. That was this additional territory which is north of the line which is shown on the map.

Q. When they refer to official territory over here on this western proposal, does that include or exclude that additional extended Zone C?

A. I'm not sure I know what their intentions were. They say "including" in one case, and they don't mention it in the other. My inference would be that they didn't intend to include it. It would be only the official territory.

Q. Official used here then is the same as official used in connection with the eastern proposals except with respect to this extended Zone C.

A. I should say, and northern Illinois and extended Zone C.

(Mr. Wright indicated same on the chart.)

5852 BY MR. WRIGHT:

Q. What was the proposal in this territory you just described that was within the western trunkline territory, within southwestern territory, between western trunkline and southwestern, and between western trunkline and southwestern on one hand, and official on the other?

A. 55 percent -- this is the way it reads, and I will explain it: 55 percent of the exceptions first class rates other than Docket 28-300, subject to ex parte 175 increase, minimum weight sixty thousand pounds.

(Mr. Wright indicating same on the chart.)

BY MR. WRIGHT:

Q. Have I got it right there? 55 percent of exceptions first class rates other than Docket 28-300?

A. That's right.

Q. The rest is the same?

A. Subject to 175 and minimum weight sixty thousand. That's right.

Q. What does that mean? That 55 percent of exceptions first class?

A. The Commission in Docket 28-300 prescribed those rates only for rates for classes given the various commodities in the classifications that the railroads had filed with the Commission. They also filed exceptions to classification where in certain territories it was decided to take
5853 certain commodities out of the classification and give it a different rating. Those rates, exception rates, remained on the former basis of class rates and did not apply to the 28-300.

So what they are trying to say here is that the 55 percent applies to their old basis of rates and not to the 28-300 rates.

Q. What is the next one you have there? Is that all for the west, or is there more?

A. Yes. That is all for the west as stated in the proceedings.

THE COURT: Mr. Wright, you are facing away from the reporter. She can't get what you are saying.

MR. WRIGHT: I'm sorry. I'm going to write out here the shipments of the same size as those heretofore, 50, 60, 70, 80, 90, and 100 thousand, and ask you to make computations of these rates using the same assumption --

THE COURT: Excuse me, Mr. Wright. Let me ask the reporter, would you rather go down there next to Mr. Wright?

(Reporter agreed and moved nearer to Mr. Wright.)

BY MR. WRIGHT:

Q. I am asking you to make the same assumption, if the first class rate were one dollar per hundred pounds --

MR. McGLOTHLIN: If Your Honor please, the witness has
5854 just testified that not all of these last three rates were on the same basis. He testified that one was with 28-300, whatever that is, and one was without it, and one was an exception. Now, it just distorts the effect to say they all have the same basis.

THE COURT: Of course, I don't like to interrupt counsel, and you gentlemen will have full opportunity to cross-examine, if he makes any mistakes.

MR. McGLOTHLIN: I think it would meet my problem if Mr. Hummer would say, what I understood -- tell me whether I am correct or not -- I understood his testimony to be that the three different rates for different parts of the west were to be computed not on the same basis.

Isn't that correct, Mr. Hummer?

THE WITNESS: well, maybe it will come clearer as I go on. I know what you mean. The first basis --

THE COURT: Would it be better to take care of it now?

THE WITNESS: I will take care of it right now.

THE COURT: All right.

THE WITNESS: The first basis, which says 50 percent of the applicable -- 55 percent, rather, of the applicable first class; the second one, which says 55 percent of the present first class --

5855 MR. McGLOTHLIN: Is that --

THE WITNESS: -- are both identical to what the Department of Defense asked for because they say applicable first class, and so whether it is 28-300, or what, we are still getting a proper comparison.

Now, where it says exceptions first class the Docket 28-300 in that territory reduced the basis of first class rates, so that any comparison I would make here would have to bear in mind that these rates are even lower than, by comparison, with what was asked for by the Department of Defense, than these direct comparisons would show.

MR. McGLOTHLIN: As I understand it now, it is fair, for the first two rates that Mr. Wright has written on the board, to say that those have the same basis as the Department of Defense proposal; that is, a dollar in the Department of Defense is the same dollar on the first two of those? I'm right so far, am I not?

THE WITNESS: That's right.

MR. McGLOTHLIN: But as to the third one, the dollar of the Department of Defense was not the same as the dollar with respect to the third proposal.

THE WITNESS: That's right.

I'm sorry. I think I misstated that. The 28-300 rates reduced these old rates so that a comparison, direct comparison, would mean that the railroads proposed something higher than the direct comparison with it.

5856 BY MR. WRIGHT:

Q. I will ask you, Mr. Hummer, to limit the comparison then to the first two. The first class rates were one dollar per hundred pounds, and this would be in Pacific Coast and Transcontinental territory. Would that do it then?

A. That's right.

Q. Now, on the fifty thousand pound shipment, how would you compute that?

A. You would have to pay on the basis of the sixty thousand pounds because that is the minimum weight, so it would be 55 cents times 600, or $330.00.

Q. And on sixty thousand you would have the same rate?

A. Same, $330.00.

Q. These are somewhat higher than the Defense Department proposal in each case; correct?

A. Yes.

Q. And then seventy thousand would be what?

A. Fifty-five times 700, or $385.00.

Q. And eighty thousand?

A. Fifty-five times 800, or $440.00.

Q. And ninety thousand?

A. Fifty-five times 900, or $495.00.

5857 Q. And a hundred thousand would be what?

A. $550.00.

Q. If I understood you correctly, Mr. Hummer, you say you cannot make a comparison, comparative computation, here for this last category within western trunkline, within southwestern, and between western trunkline and southwestern, and between western trunkline and southwestern on the one hand, and official territory on the other?

A. No, because there was no definite relationship between the prescribed 28-300 scale and the previously existing rates, although they were in general -- the previous ones were, in general, higher, so whatever comparison you made on any individual points would give you somewhat higher rates recommended by the western railroads, and we show that.

Q. Somewhat higher than these shown underneath --

A. Yes. In other words where the first class rate is $1.00, 28-300 might be $1.15, or something like that on the old basis.

Q. I would like to make the same comparison for southern.

(Mr. Wright indicating on another chart "Southern Railroads' Proposal.)

THE COURT: It looks like the spectators are gradually being

5858 pushed over to the wall.

BY MR. WRIGHT:

Q. All right. Will you turn to the proposals in the southern territory there?

A. Within southern territory and between southern territory on the one hand, and all other territories on the other, no change in the existing general basis.

Q. That is within southern and between southern and what else -- all others?

A. And all other territories.

Q. There was no change in the existing rates?

A. Yes.

Q. Do you have anything there to indicate what the existing rate level was in that territory?

A. No. There is nothing in this Report of Proceedings to indicate that.

Q. And we would have to go to the quotation itself to get that? Correct?

A. Yes.

* * *

DIRECT EXAMINATION OF MR. HUMMER BY MR. WRIGHT

5866 BY MR. WRIGHT:

Q. Mr. Hummer, you have read that quotation, have you, that is marked in evidence as Exhibit 201 that I read the first part of?

A. Yes.

Q. You have read all of it. Now, I am going to ask you to tell me, if you can, by these territories, just what, if any, differences there are in the quotation that you have there and the proposal as it appears here. Take the eastern railroads first, if you will.

A. The quotation covers the same thing as the recommendation.

Q. The same territory and the same rates? Now, that quotation is effective as of what date?

A. October 20, 1955.

Q. Now, that, you say, is the same as what's shown there?

A. That's right.

5867 Q. Now, as to the western railroads, would you examine their quotation that was effective October 20. I will put the exhibit number in--that is Exhibit 201.

(Mr. Wright indicated same on the charts.)

BY MR. WRIGHT:

Q. Now, did you examine the quotations in the areas there, and would you tell us what, if any, differences there are between the quotations that became effective on October 20, 1955 and what is shown there on the chart?

A. The Pacific Coast territory, they did not refer to 55 percent of first class. Instead, they appended a mileage scale to be applied in that territory. Gives distances in miles and opposite each distance block is the rate in cents per one hundred pounds.

Q. They substituted a mileage scale for the first class reference?

A. That's right.

Q. Now, that territory was where, again? Would you indicate

it with your pointer, please?

A. The Pacific Coast territory, Salt Lake City, Utah, and west -- this territory west of the line running through Salt Lake City -- within that territory.

Q. How about the other western proposal? Is there any difference between the quotation, the given quotation, and the proposal?

5868 A. Transcontinental territory -- between transcontinental territory and the territory east of the line running along the western boundary of North Dakota down to El Paso, Texas, the same territory we had in mind there, to territory east of that line, except southern territory, that's the same. So that second item will be the same.

Q. How about the last one?

A. Within western trunkline and southwest, and between those territories is the same. Between eastern territory and western trunkline is the same. Between eastern territory and southwest is the same. That item would be the same.

Now, they have also added something that wasn't mentioned in the proceedings.

Q. What is the addition?

A. In addition to the Pacific Coast territory the scale which they have appended to the quotation applies in Mountain Pacific territory, which is the territory west of this line I have just mentioned, from the northwestern boundary of North Dakota down through Colorado, Wyoming, and New Mexico. In other words, not only the territory west of Salt Lake City, but all of the territory west of the line I just described, is subject to that scale.

Q. What states were those, roughly, in that added territory?

5869 A. Montana, Wyoming, most of Wyoming, western part of Colorado, western part of New Mexico, Arizona, Nevada, Idaho, Utah, Washington, Oregon, and California.

Q. May I have those again? All I have is Montana and Wyoming.

Just give me the rest.

A. Montana, Wyoming, western part of Colorado, --

Q. I'm just talking about the addition.

A. The addition. All right. That is still Montana, Wyoming, western part of Colorado, western part of New Mexico, eastern part of Arizona, eastern part of Utah -- that about covers it, because I think the rest of the states were in the Pacific Coast territory.

Q. Would you turn to the quotation on behalf of the southern railroads as it appears in Exhibit 201.

A. Within southern territory and between southern territory, and all other territories. That is the same as you have there. 65 percent of first class.

Q. 65 percent of first class?

A. That's right. Minimum weight 50 thousand pounds, and there is a note stating that this will not apply in connection with 28-300 scale.

Q. Did you say 50 or 60 thousand pounds?

A. 50 thousand -- five.

Q. Now, I didn't get the reference to 28-300.

A. Will not apply in connection with 28-300.

5870 BY MR. WRIGHT:

Q. Can you tell me what that means, "Will not apply in connection with 28-300"?

A. The only thing left for it to apply to in connection with would be the old rates --

MR. GATES: I am going to object to the speculation of this witness. He either knows or does not know.

THE COURT: Yes. You cannot speculate on that. Give the statement of fact if you can.

THE WITNESS: Well, that is a fact.

BY MR. WRIGHT:

Q. Well, now, then those--the first class rate there then would be different from your first class rate referred to in the Defense Department, as also in these Eastern and Western charts?

MR. GATES: Object to this question as being leading and suggestive.

THE COURT: I will ask you to reframe the question.

BY MR. WRIGHT:

Q. What, if any difference would that make in the First-Class freight as applied on the Southern Railroad quotation and say, the Defense Department proposal?

5871 A. It would not apply against the same scale of rates. The older rates in the south were higher than the 28-300 rates.

* * *

5896 Q. Now, I want to direct your attention to a quotation in evidence as 202, and the amendment to that quotation that are in evidence as 202-A and 202-B.

Now, can you first describe for us briefly what that quotation is, that 202?

A. That is a quotation presented by the Southwestern Freight Bureau, No. 1798 and provides a changed basis for certain territories that we have already considered, and its effective date is March 1, 1956.

5897 Q. That is also a quotation on ammunition and explosives and ordnance.

A. Yes.

Q. It is addressed to those certain parties as 201 was addressed to?

A. Yes, also --

MR. GATES: I object to that.

THE WITNESS: Also the U.S. Marine Corps.

MR. GATES: The document speaks for itself and it was not to the same parties.

THE COURT: The document will speak for itself.

BY MR. WRIGHT:

Q. Just what are the differences between the addresses on 202 and the addresses on 201?

A. 201 was addressed to the Department of the Army, Office of Chief of Transportation. 202 is addressed to the Department of Defense, Transportation Division, and also to the Department of the Army, Office of Chief of Transportation: 201 was addressed to Chief Adjustment Section, Adjustment and Classification Branch, Traffic Division, Headquarters Air Materiel Command, Wright-Patterson Air Force Base.

This one does not seem to be addressed to--yes, it does, too. It is addressed to the same Air Force Base, Department of the Navy, Bureau of Supplies and Accounts, both of them.

5898 And, in addition, 202 is addressed to the United States Marine Corps, Washington 25, D.C.

BY MR. WRIGHT:

Q. Now, you said, I believe, the effective date of this quotation was March 1, 1956?

A. Right.

Q. Now, can you tell us what that quotation did?

A. That applies to Class 45 or 45 per cent of first class rating, minimum weight forty-thousand pounds, and the 80 per cent of Class 45 on excess over 40,000 pounds.

That is on traffic between Southwestern Territory and certain individual points: St. Louis, Kansas City, East St. Louis, and it also states St. Louis and Kansas City, Missouri, East St. Louis and Thebes, Illinois.

Q. Could you give me a shorthand description of that that I can put on the chart, between Southwestern Territory and what?

A. What we generally call border territory. It is the gateways of St. Louis, Kansas City and stations in Kansas, Missouri, between those

two points which are the borderline between the Southwest and the Western Trunkline Territory.

5899 Q. Would it be fair to say Southwestern Territory and St. Louis and Kansas City Gateways?

A. That was a part of it.

Q. Now, what was the rest of it?

MR. SHEA: Not only is this leading, I think it is misleading. It is obvious this is only between certain specified stations.

THE COURT: Let us see if we can get a stipulation. Can't you agree and stipulate on what the fact is?

MR. WRIGHT: I will be happy to write it down here anyway that--

THE COURT: Can you give us a stipulation, Mr. Shea, so that we can get it properly on the Board there?

MR. SHEA: Well, your Honor, I do not know any simpler way to do it. This is not my particular--this does not touch me, anyway.

THE COURT: It does not touch you at all.

MR. SHEA: He starts talking about Southwestern Territory, which, of course, does not involve me at all.

THE COURT: Well, maybe somebody else ought to do it.

Mr. Gates.

MR. GATES: Your Honor, I think Mr. Hummer did come pretty close to answering it a moment ago. The station provides certain named cities, namely:

5900 St. Louis, Kansas City, East St. Louis, Thebes and then says "Also stations in Kansas and Missouri, Northern Region."

If those stations happen to be served by one of eight railroads, I can quite understand Mr. Hummer's hesitancy about naming those particular stations served by those eight railroads, and likewise Mr. Wright's problem in trying to serve as a description up to there. I think Mr. Hummer used it

as border stations or border states.

THE WITNESS: Border territory.

MR. GATES: Border territory. I think that probably says it correctly and satisfies the record for our purposes. Maybe Mr. Flynn has another feeling about it. But I think that would help.

THE COURT: Let me make this suggestion, Mr. Wright.

Instead of continuing to write on those boards, suppose you develop what you want to and maybe you can get a stipulation or an agreement among counsel as to what ought to go on those particular boards or exhibits. Do not put any more on there than you must. We might be able to do it that way, instead of trying to write down what you think the exceptions are and all of that sort of thing.

MR. WRIGHT: All right.

5901 THE COURT: You may do it anyway you wish to do it. I just suggest that.

MR. WRIGHT: I will just put an et cetera there to make out a description that is ultimately agreed upon.

I want to get the actual rate that was applicable to whatever this territory is.

THE COURT: All right.

BY MR. WRIGHT:

Q. On that rate, is that the same as our rate shown with the Eastern Railroads' proposal or Exhibit 200?

A. Yes.

Q. Now, is that all that quotation did? Are there other territories covered there?

A. No, that is all in that quotation.

Q. Then that first amendment is 202-A, is it? The one dated March 5, 1956?

A. That is right.

Q. Now, when was that effective--was that effective as of the same date--

A. Effective March 1, the same as the original.

Q. Now, what did that do?

A. Increases the territory. That applies this same basis between points in Southwestern territory and the same territory we had in the original quotation, plus stations in Illinois on some ten or fifteen railroads.

5902 Q. Well, now, between Southwestern territory and--

A. St. Louis, Kansas City.

THE COURT: Excuse me, Mr. Wright. Miss Reporter, would you rather move down there closer to Mr. Wright?

BY MR. WRIGHT:

Q. I wanted to get clear the relationship of this description you just gave me of this territory that was affected by this March 1, 1956 quotation, and the description that was up here in the prior proposal.

You started to say between Southwestern and what else?

A. You are speaking about the original now, or amendment 1?

Q. Yes. Amendment 1 does what?

A. Amendment 1 adds to the original quotation a territory in Illinois, stations in Illinois, on a number of railroads, in addition to this Missouri-Kansas territory, we had in the original quotation.

Q. Is that all that it does?

A. Yes.

Q. "Adds stations in Illinois," you say?

A. Yes, sir. On about 13 railroads.

Q. Stations in Illinois served by thirteen railroads?

A. Yes.

Q. That applies the same rate there, right?

A. Yes.

Q. Then have you got the amendment No. 2 there, that is what, 202-B?

5903 A. Yes.

Q. What did that do?

A. That applies the same basis throughout Southwestern Territory, that is within Southwestern Territory, between Southwestern Territory and Eastern Territory and between Southwestern Territory and Western Trunkline Territory, with the exception of an area in Minnesota, North and South Dakota.

Q. All right, if you will give it to me slowly, I will write it down here.

A. Within Southwestern Territory.

Q. Yes.

A. Between Southwestern Territory and Official Territory.

Q. Yes.

A. Between Southwestern Territory and Western Trunkline Territory.

Q. Anything else?

A. Except certain named stations in Minnesota, all stations in North Dakota except certain named stations, and four stations in South Dakota.

5904 Q. Can you indicate on the map where they were?

A. The exception bases and the points which do not apply that new basis is points in Minnesota, West of the line between Dubuque and Minneapolis, and north of the Great Northern Railway running out of Minneapolis over to Moorehead, Minnesota. The whole state of North Dakota except half a dozen points, and including four stations in South Dakota. North of that line is not included.

Q. Now, I will just write down here "Except certain parts of"--what was that, Minnesota, North Dakota and South Dakota?

A. Right.

Q. Now, have you covered all the exceptions in the quotation 202 and the amendments 202-A and B?

A. Yes. 202-B effective March 1, same as the original one.

Q. Now, when you get all through with those amendments, can you supply a description of what the area is in which this quotation of March 1, as amended, applied those rates which were originally proposed by the Eastern Railroads? Can you point it out on the map?

A. Within Southwestern territory -- the entire Western Trunkline Territory except this northern part, as I have just described. Between South-
5905 western Territory and Official Territory, and between Southwestern Territory and Western Trunkline Territory except this northern here.

* * *

5906 MR. WRIGHT: I was about to proceed to that quotation which I think is in evidence, or has been identified as 203. It is not marked in evidence.

I would like to offer it. It is the quotation dated April 3,

1956, headed Western Trunk Line Committee, Illinois Freight Association, TEA, Eastern Railroads, and Southern Freight Association, and addressed to the Department of the Army, and the Navy, and the Marine Corps, and the Adjustment Section of the Air Materiel Command.

THE COURT: Against which defendant or defendants is it offered?

5907 MR. WRIGHT: This is offered against all of the railroad defendants and the TEA.

THE COURT: Counsel may file objections, if they are going to file any.

(The document previously marked for identification as Plaintiff's Exhibit No. 203 was received in evidence, Document No. 96, Quotation of April 3, 1956.)

DIRECT EXAMINATION (Resumed)

BY MR. WRIGHT:

Q. Mr. Hummer, do you have a copy of this? Look at this quotation that has been marked as 203. Do you have a copy of that there?

A. Yes.

Q. Have you previously made an examination of that quotation? Have you?

A. Yes.

Q. Can you tell me the effective date of that?

A. I don't find any effective date shown on this.

Q. The quotation itself is dated what?

A. April 3, 1956.

Q. Well, now, I would like to write out here what that quotation means. April 3, 1956, is that?

A. Yes, that is the date of the quotation.

Q. Now, can you tell me where that quotation applies? What area is covered?

5908 A. Between points in Western Trunk Line territory and exceptions; between points in Illinois Freight Association territory; between points in Southern Freight Association territory; between points in Western Trunk Line territory with exceptions on one hand, and points in official Southern territories; between points in Illinois, Iowa, Michigan, Wisconsin, as listed in certain items on the tariff on the one hand, and points in official territory; between points in Southern territory on one hand and points in official, including Illinois Freight Association territory, on the other.

Q. Well, now, if you give me first just those that affect Southern territory. If you give me those which affect Southern territory, I can write them in over here.

A. Between points in Southern territory.

Q. Now, would you indicate on the map again where that Southern territory is that we are talking about.

A. South of the line beginning at Norfolk, Virginia, following the line of the Norfolk and Western Railway to the Ohio River, following the Ohio River to the Mississippi River, and the Mississippi River to New Orleans.

All south and east of that line.

Q. Now, what are the other areas that are covered that relate to Southern Territory?

5909 A. Between Southern Territory on the one hand and points in official, including Illinois Freight Association Territory on the other.

Q. Could you point out on the map, please, where the area is referred to there?

A. It is between this territory I have just described, and points north of that line, from the Atlantic Coast over to the Western boundary of Illinois, including the southern peninsula of Michigan.

Q. Are there any others that affect Southern Territory in that quotation?

A. No, that is all that affects Southern Territory.

Q. What is the quotation itself?

MR. SHEA: May I have that last answer read?

THE COURT: Read the answer, Mr. Reporter.

(The last answer was read by the reporter.)

MR. SHEA: May I have the question read, too?

(The question and the answer were read by the reporter.)

THE WITNESS: I am sorry, there is another.

BY MR. WRIGHT:

Q. Which is that?

A. Between Western Trunk Line Territory and points in Southern Territory.

Q. That is between Western and Southern?

A. Western Trunk Line and Southern.

Q. Western Trunk Line and Southern.

5910 Now, will you indicate on the map, please, the area that you are talking about there, the Western Trunk Line again?

A. It is the same Southern Territory we have spoken about, and the territory west of the official territory that we have just spoken of, and north of the line cutting across through Missouri and Kansas, and north to the Canadian boundary, including the upper peninsula of Michigan.

Now, the western boundary of the Western Trunk Line is not this line, but it is irregular, and it goes in parts of these states.

Q. When you say these states, what states?

A. The states of Wyoming and Colorado.

Q. Now, what is the --

A. And into Utah.

Q. What is the quotation made effective in this area that you described by this Exhibit 203?

A. It is 45 percent of first-class, minimum weight 40,000 pounds.

Q. 40,000 pounds?

A. 40,000 is right, plus 80 percent of 45 percent, or 36 percent of the excess over 40,000 loaded in the same car, and it applies to the 28-300 scale.

Q. You say the 28-300 scale applies to this? Is this in that Eastern Railroads?

A. Yes, it would be the same level as the Eastern Railroads.

5911 MR. SHEA: Do I understand the witness to indicate that there has been no change on the base from the time of the first?

THE COURT: Suppose you read the answer, Mr. Reporter.

(The last answer was read by the reporter.)

BY MR. WRIGHT:

Q. That 175, the ex parte 175 increase, is that also applicable to this?

A. Yes, that would apply because it refers to the specific tariffs which are subject to that increase.

Q. Now, are there any exceptions stated in this tariff here? Oh, excuse me, that is all of the Southern?

A. There is an exception to the Western Trunk Line Territory, part of that, and it excludes the territory in Minnesota, North Dakota, and South Dakota.

MR. WRIGHT: I will put that part that relates to the territory on this continuation of this chart, and we can have that identified.

5912 BY MR. WRIGHT:

Q. Now, will you read me the parts of that quotation of April 15, 1956 that affected Western Territory that you haven't already covered?

A. Between points in Western Trunk Line Territory.

Q. Yes.

A. Between Western Trunk Line Territory on the one hand and points in official territory on the other.

Q. What else?

A. That is all that specifically refers to Western Trunk Line Territory. There is an item that says, between points in Illinois, Iowa, Michigan, and Wisconsin, but I can't tell without referring to another chart whether those points are in Western Trunk Line or not.

Q. Between points where?

A. In Illinois, Iowa, Michigan, and Wisconsin on the one hand and points in official territory on the other.

THE COURT: Mr. Flynn.

MR. FLYNN: Your Honor, I think that would be more accurate if it said specified points, since this does say that there are certain listed points.

THE WITNESS: Specified points, yes, sir.

5913 BY MR. WRIGHT:

Q. And are there any more areas that are covered by the quotation?

A. In both, where the Western Trunk Line Territory is mentioned, it excludes certain territory in Minnesota, North Dakota, and South Dakota.

Q. That is excluding parts of what states?

A. Minnesota, North Dakota, and South Dakota.

That is also true over here in connection with the Southern Territory.

THE COURT: Mr. Gates, did you want to say something?

MR. GATES: I was trying to facilitate and expedite this if I could, Your Honor. Mr. Wright has asked Mr. Hummer to put down there all that affected Western Trunk Lines, and the counterpart of the relationship between the Southern Freight Association and the Western Trunk Line comes to Western Trunk Line, so I think the chart would be more complete if it showedfthe Western Trunk Line and the Southern Territory was covered in your chart over there, Mr. Wright.

THE COURT: Well, do you agree with that?

MR. WRIGHT: Well, I will put it on both places.

BY MR. WRIGHT:

Q. What was the rate that applied in those territories?

A. The same, 45 percent on a minimum of 40,000, plus 80 percent of 45, or 36 percent, on the excess over 40,000 loaded in the same car.

5914 Q. And does the same Docket 2300 and Ex parte 175 increase also apply to this rate here?

A. That is true.

MR. SHEA: Are we to understand the witness is testifying that as of the date of this quotation that the Ex parte 175 was the only increase?

THE COURT: Will you answer that question if you can?

THE WITNESS: No. No, I haven't said that.

MR. SHEA: I notice the Ex parte 175 was being put down and nothing else.

BY MR. WRIGHT:

Q. Was there another increase?

A. Yes, at this time, on the date of April, 1956, another ex parte increase had become effective known as Ex parte 196.

Q. What date did that Ex parte 196 increase become effective?

A. As I recall it, that was March 7, 1956.

Q. March 7, 1956?

A. Yes.

Q. How much of an increase was it, do you know? Is this a general or across the board increase?

A. Yes, it was 6 percent, I believe.

Q. And that would also apply over here in this territory?

5915 A. Yes, that is right.

Q. What was the date of that again?

A. March 7, 1956.

MR. McGLOTHLIN: Excuse me. I don't know whether Mr. Wright intends to put it on the chart, but it is a fact, isn't it, that 196 also applies to each of them?

THE COURT: Is that correct?

THE WITNESS: Yes, 196 applies to the entire country, and we haven't discussed amendments to this other quotation, but it is my understanding that they have brought up the 196 on all of those other quotations.

BY MR. WRIGHT:

Q. I would assume as general increases apply, or do general increases such as this apply, whether you go through the motions of amending the quotation or not, or do you have to amend to take advantage of the increase?

A. I would say that they would have to be amended. You have to amend the tariff. Unless the quotation was so worded that you apply the rate that is in the tariff, then the amendment to the tariff would automatically take care of it.

Q. Well, now will you look through -- do you have there copies of the amendments to Exhibit 201? Have you?

A. Yes.

Q. I will hand you some 34 amendments to the tariff that is in evidence, this 201, which has been identified here as 201-A through 201-HH, and ask you if you have examined copies of those; have you?

5916 A. Yes.

5916 Q. Now, was there any amendment prior to April 3, 1956 which made a change in the level of rates as shown here on this Eastern Territory chart?

A. You are speaking of the Eastern Territory?

Q. Yes. I was referring to this quotation that is in evidence here as 201. Was there amendment to that which specifically applies to any ex parte 196 increase?

A. No, I don't find any such amendment, but since that date, apply first 45 rate as published in tariff No. E-1009. The date that was amended to include -- the date the tariff was amended to include the Ex parte 196 increase, it would automatically have applied to the quotation.

Q. The Ex parte 196 increase, you said, was approximately 6 percent?

A. That is what I recall.

Q. That applied as of April --

A. March 7, 1956.

Q. March 7, 1956? A. Yes.

Q. Now, calling your attention again to those amendments that you have in front of you to the quotations here that became effective October 20, 1955, in evidence as Exhibit 201, were there any of those amendments which affected either the general level of the rate or the general area that the rate covered?

* * *

5918 THE WITNESS. Amendment No. 9 added the Ex Parte 196 increase to the scale of rates applying in the Pacific Coast territory.

BY MR. WRIGHT:

Q. This is Amendment 9. Can you read the identifying number on it, there?

5918 A. That is 201-I.

MR. GATES. Excuse me just a minute, if the Court please. This is Pacific Coast territory he is talking about, and he is about to put it on the Eastern Railroads proposal again.

THE COURT. All right, let us get it on the right one.

MR. WRIGHT. All right. I guess we already have it on the --

THE COURT. It is a good thing we have such good watchmen over here.

THE WITNESS. It would be on the original chart, under that list.

MR. WRIGHT. I think it is already covered on the Western territory. That is what it applies --

THE WITNESS. No; that is Western trunk line territory. That wouldn't cover Pacific Coast.

MR. WRIGHT. The amendment is to take care of the Pacific. All right.

5919 BY MR. WRIGHT:

Q. That Pacific territory, will you point that out again, please, on the map.

A. That original Pacific Coast territory was on and west of line running through Salt Lake City. But it also had added these other states to it. I think you have it defined on that chart under that.

Q. And that is an amendment to the October 20th, 1955 quotation that is in evidence as Exhibit 201?

A. Yes. It is listed as Exhibit 201-I that makes the change.

Q. The amendment is Exhibit 201-I. Now what does that do?

A. That adds the Ex Parte 196 increase to the scale which has been brought up to include the .75 increase as well.

Q. Did this amendment do anything with respect to the 75 increase?

A. It simply incorporates it in the sense of the 100-pound scale. That is, the scale itself has been increased to include it.

Q. Does it add both the Ex Parte 196 increase and the 175?

A. No; it was already in the 175 from the beginning.

Q. I see. This simply adds the Ex Parte --

5920 A. Adds the 196.

Q. (Writing on chart) "Increase to the existing schedule."

A. Incidentally, this was effective February 25th, 1956.

Q. It is amendment effective February 25th, 1956. Is that the effective date?

A. Of the amendment, yes. In other words, it went into effect on this quotation before it went into effect in the tariffs.

Q. Now are there any others which you find there which affected either the general rate level or the general areas that the rate applied in?

A. I don't find any more that affected general rate level. There are some changes in some additions of states and some of these territorial descriptions which will affect those particular localities, but not the general picture.

Q. Well, can you give me the names of the localities affected by the changes?

A. Amendment No. 3 --

MR. McGLOTHLIN. Your Honor, when the witness refers to the amendment number, will he also please mention the exhibit number?

THE WITNESS. Yes, I will, when I locate it.

MR. McGLOTHLIN. Thank you.

5921 THE WITNESS. Exhibit 201-C. Where we originally had between Western trunk line and Southwestern, and points in Montana and Nevada, now adds Idaho, Colorado, Oregon, Utah and Wyoming to that 55 per cent base.

BY MR. WRIGHT:

Q. That was effective as of what date?

A. That goes back to October 20th.

Q. That was retroactive to the 20th. And that should be added

to this effective October 20th. What area is there now that that added to this shown here?

A. You see where it says Western trunk line? It is one of the exceptions, I think, which shows it. They added Montana to the Western trunk lines.

Q. You have listed there, in the exception, add Montana to between Western trunk line and official territory.

A. No. The one I am speaking of now is the next one. It says add Montana and Nevada to Western trunk line and Southwest. This exception adds several other states in addition to Montana and Nevada.

Q. In other words, that extends this exception here, where you say, "Except add points Montana and Nevada"?

A. That is right.

Q. To between Western trunk line and Southwestern territory. Now what would do that?

A. It adds Idaho, Colorado, Oregon, Utah and Wyoming.

5922 Q. (Writing on chart) Idaho, Colorado, Utah -- and what are the others?

A. Oregon and Wyoming. Now I should say there that they are specified points in those states that are carried in a list of tariffs. It doesn't necessarily mean the whole state.

Q. What is that amendment exhibit number again that you referred to? A. 201-C.

Q. All right. Are there any others?

A. The 201-D adds certain states to the one just above that, between Western trunk line and Official. Where you have Montana, it adds Idaho, Utah and Wyoming.

Q. What is added here, on this one?

A. Idaho, Utah and Wyoming.

Q. (Writing) Idaho, Utah and Wyoming.

A. And, again, it is points published in a certain tariff.

Q. Added by -- and what is the exhibit number of that amendment?

A. 201-D. And that is also effective October 20th.

Q. Are there any others?

A. Exhibit 201-G brings up a new item on export and import traffic between certain states and southern ports. It is a 65 per cent of first class car minimum 50,000 pounds, the same as you had on Southern territory.

5923 Q. That is between what points?

A. It is points in the states named, and two tariffs that are named.

Q. What are the states named?

A. I didn't hear you.

Q. I said what are the states that are named.

A. They are not named here. You would have to refer to the tariffs.

Q. Are there any others?

A. Exhibit 201-J provides between points in Texas. That again refers to an individual tariff, and gives the rate base scale to apply. Car minimum, 60,000. It doesn't state what percentage.

Q. Does it indicate the Texas points? Are the Texas points stated?

A. No -- between points in Texas, apply rate base scale 255, published in Texas lines tariffs, certain numbers.

Q. Are there any others?

A. Exhibit 201-R amends the item in regard to export and import traffic, by adding to that coastwise and intercoastal traffic. That was an item that preserved the regular port differentials.

(There was a delay in the proceedings.)

THE COURT. Is there a pending question, Mr. Wright? Or is the witness looking for something?

5924 MR. WRIGHT. I was asking him to go through all the amendments and to pick out any which affected either the general level of the

rates established by that October 20th quotation, or the general areas that they applied in.

THE WITNESS. Exhibit 201-Z adds another ex parte increase to the mileage scale in the Pacific Coast territory. It is Ex Parte 206.

BY MR. WRIGHT:

Q. That would apply, would it, in all the Eastern, Western and Southern areas?

A. That would come up automatically in the tariffs, and those they had to add to this scale, because that didn't refer to the tariffs.

Q. Does that come on the Eastern chart, or --

A. Well, this particular one, the Pacific Coast, on the Western chart.

MR. BALL. If the Court please, I wonder if we can't simply agree and simplify this, that this last ex parte increase applied automatically to all those that were based on a class rate basis, and it had to be added specifically to those rates which were quoted as specific point-to-point rates.

THE COURT. Do you agree to that stipulation?

MR. WRIGHT. Surely.

5925 THE COURT. All right. That saves some time.

THE WITNESS. That was effective December 26.

BY MR. WRIGHT:

Q. What was the date of that?

A. It says December 26, and it looks as if it has been crossed out in pencil to read the 28th.

MR. GATES. We will stipulate it was December 28th, Your Honor.

THE COURT. You will stipulate it was December 28th?

MR. WRIGHT. Effective December 28th, 1956.

BY MR. WRIGHT:

Q. What is the number of that amendment, again? That is Exhibit 201-Z?

A. Yes.

Q. And that added -- what was the increase? Ex Parte what?

A. Ex Parte 206.

Q. To existing tariff.

MR. WRIGHT. That amendment added the increase to the scale in the Pacific territory, and it is stipulated that it applied automatically to all the other tariff quotations? Is that correct?

BY MR. WRIGHT:

Q. Do you know approximately how much that Ex Parte 206 increase was?

5926 A. That differed in the different territories. I don't know that I can remember the exact percentage, or take the time to -- I don't believe I would like to hazard a guess, because I wouldn't be too sure.

* * *

5949 Q. Mr. Hummer, do you have in front of you there the interrogatory answers that were supplied by the railroad defendants, that give dollars-and cents rates between the specific points? A. Yes.

MR. WRIGHT: I will use this copy to have marked.

I will ask to have marked with the next Plaintiff's number for identification, the answers of the Western Railroad Defendants to Plaintiff's interrogatories served December 17, 1959.

Just mark that.

5950 THE CLERK: Plaintiff's Exhibit No. 208, for identification.

(Whereupon Western Railroad Defendants' Answers to Plaintiff's Interrogatories served December 17, 1959, were marked Plaintiff's Exhibit No. 208, for identification.)

BY MR. WRIGHT:

Q. Now, Mr. Hummer, you have a copy of this 208 in front of you; have you?

A. That is from the Western Railroads?

Q. It is headed -- Well, you had better compare the two --

A. Defendants 8, 16, 21 --

Q. -- to be sure that you do.

A. Yes.

Q. That document you have there, Mr. Hummer, does that show the actual dollars and cents rates that were quoted by railroads between specific points?

A. Yes.

Q. I will call your attention to Appendix B.

A. It shows what the railroads have stated to be the cents per hundred pounds resulting from certain quotations.

Q. With respect to specific points on particular dates?

5951 A. Yes.

Q. Now, I would like to have you make comparisons, if you will, between the rates in effect between specific points on particular dates, and I will write it down here.

That first one, Page 1 of Appendix B, that refers to what points?

A. N.A.D. Shumaker, Arkansas -- it is from there -- to Sunflower Ordnance Depot, DeSoto, Kansas.

Q. That destination is to Sunflower Ordnance?

A. Yes, DeSoto, Kansas.

Q. DeSoto, Kansas.

Now, can you give me the dollar-and-cent rate that was quoted between those points as of March 1, 1955?

A. 244.95 cents.

MR. GATES: Your Honor, I wonder if we should be advised against whom this testimony is being offered? The Western Railroads?

THE COURT: Against whom is this being offered, this testimony?

MR. WRIGHT: This is being offered against the Western Railroads.

THE COURT: Western Railroads. All right.

MR. FLYNN: I would like to point out, Your Honor, in this particular one we are talking about, only seven out of the fifteen Western Railroads had anything to do with this rate that he is offering. I assume he is offering it against the fifteen.

5952 THE COURT: Mr. Wright, do you want to say anything about that?

MR. WRIGHT: Yes, that is correct. Of course, all of the fifteen railroads did not participate in all of the movements that are shown here. The particular railroads that did participate in the rate or the quotations that are shown are shown on Appendix A here.

The particular ones that are shown on Appendix A with respect to shipments from Shumaker, Arkansas to DeSoto, Kansas are:

The Atchison, Topeka and Santa Fe; the Chicago, Burlington and Quincy; the Chicago, Rock Island and Pacific; the M-K-T; the Missouri Pacific; the St. Louis, San Francisco; and the Wabash.

THE COURT: You are offering this against all of the Western Railroads?

MR. WRIGHT: Yes.

THE COURT: I am going to admit it for the time being, subject to a motion to strike at a later time.

MR. BALL: Yes.

THE COURT: All right.

5953 BY MR. WRIGHT:

Q. Can you give me the dollar-and-cent rate that was in effect, the quotation on that March 1, '55 date?

I think you did give it to me but I didn't write it down.

A. March 1, '55, 244.95 cents.

Q. That is 244.95 cents per hundredweight; is it?

A. Per one hundred pounds.

Q. And does it show the class rate that that represented?

A. Yes, 65.

Q. Now, could you compute for me what the cost would be, the

rate charged on a 90,000-pound shipment?

A. It would be 900 times that figure.

Q. Can you tell me what the cost would be?

A. That figures to $2204.55

Q. $2204.55? A. Yes.

Q. All right. Now, can you, from looking at the same schedule, tell me the rate that was in effect on April 4, 1956?

MR. BALL: May I make a point, just for clarification?

5954 Where it says, "Rates," I think the Jury might understand that if that had a dollar sign in front of it and a period after the "2," $2.4495. I am just making a suggestion for clarity.

THE COURT: The second column there.

MR. WRIGHT: I was writing it as it appears in the interrogatory.

MR. BALL: I appreciate that. It is just a matter of clarity.

MR. WRIGHT: I agree it would be clearer. If you were going to put a dollar sign in front of it, you would have to write it that way (indicating).

THE COURT: All right.

MR. BALL: Thank you.

BY MR. WRIGHT:

Q. Now, could I have the April 4 dollar-and-cent rate as it appears there in the schedule?

A. It is $1.35. That is the minimum. I assume that is on the 40,000 pounds, plus the $1.08 on the excess.

Q. Does it not there tell you the minimum?

A. Oh, I see. This "Z" up in the next block above covers all these others.

Yes, that is $1.35 on 40,000 pounds.

Q. And then?

A. And $1.08 on the excess over 40,000.

That would be 50,000 in the case of the 90,000-pound haul.

5955 THE COURT: Keep your voice up, Mr. Hummer.

THE WITNESS: That would be 50,000 pounds in the case of a 90,000-pound load.

BY MR. WRIGHT:

Q. Now, in class rate terms, are those shown there?

A. Yes. That is Class 45 on 40,000 minimum, and eighty per cent of 45 for the excess.

Q. Eighty per cent of 45; that would be 36 on the excess?

A. Yes.

Q. Now, can you compute for me the actual cost of the 90,000-pound shipment at these rates that were in effect on April 4, 1956?

A. That would be $1.35 times 400; be $540; plus $1.08 times 500; would also be $540; making a total of $1,080.

Q. All right. I won't ask you to compute the percentage of decrease as you sit there, but I would like to insert in the chart a percentage computation showing the percentage of decrease in the 90,000-pound shipment price over that period of time.

THE COURT: All right.

5956 BY MR. WRIGHT:

Q. Now, what is the next point on there?

A. Page 2 is Pueblo, Colorado and Charleston-Watson, Indiana.

Q. Does it say what arsenals are involved there?

A. Pueblo Ordnance Depot, Pueblo, Colorado; Charleston-Watson, Indiana, Indiana Arsenal.

Q. That is Indiana Arsenal?

A. That is right.

Q. And can you give me the rates on these same dates, March 1, 1955?

A. March 1, 1955 is $3.703.

MR. BALL: May it be understood that this rate now affects a different set of railroads than the first rate?

MR. WRIGHT: Yes. I will read them off in each one. We don't have room to put them on here.

MR. BALL: Just so it is understood, yes.

MR. WRIGHT: The railroads participating in this line are: Atchison, Topeka and Santa Fe; Chicago, Burlington & Quincy; Chicago, Milwaukee, St. Paul; Chicago and North Western; Chicago, Rock Island; Illinois Central; M-K-T; Missouri Pacific; St. Louis San Francisco; and Wabash.

5957 BY MR. WRIGHT:

Q. That is $3.70-odd cents per hundredweight?

A. Yes, $3.703.

Q. And that is what class?

A. That is 65.

Q. Can you compute for me the total charge on the 90,000-pound shipment?

A. $3332.70.

Q. $3332.70?

A. Yes.

Q. And could you give me the rates shown as of April 4, 1956?

A. $2.04 on 40,000 pounds; and $1.63 on the excess over 40,000.

Q. Are the class rates shown there, too?

A. That is 45 on the 40,000, and 80 per cent of 45 or 36 per cent on the excess.

Q. Now, can you compute the total payment on the 90,000-pound shipment on the April 4 rate, April 4, '56?

A. $1631.

Q. Is that even? A. Even, yes.

Q. What is the next one?

A. From Joliet Arsenal, Areas 1 and 2, Illinois, to Parsons, Kansas Ordnance Plant, Kansas.

5958 Q. Now, could you give me again the March 1, '55 rate?

A. $2.162.

MR. FLYNN: Your Honor, since all this witness is doing in this part of his testimony is reading the answers to interrogatories, it is best to point out that that is an error.

It shows on this answer to interrogatories that effective October 8, 1954 until December 31, 1955, there was in effect a special quotation of $1.89.

THE COURT: Hasn't he been reading the answers?

MR. FLYNN: He has up until this point, but there was a basic quotation that was in effect at that time; then in addition, there was a specific point-to-point quotation between these two named points. It is all shown on here. I am not adding anything to the exhibit.

THE COURT: Mr. Wright.

MR. FLYNN: If you look in Column 4 --

THE WITNESS: He is right. I overlooked this other column. It is $1.89 under special quotation.

MR. WRIGHT: $1.89.

BY MR. WRIGHT:

Q. And that, you say, is not a class rate; it is a special quotation?

5959 A. Yes.

Q. Now, do you have there the rate shown for April 4, 1956?

A. That is $1.29 on 40,000; $1.04 on the excess.

Q. Now, do you have a class rate there?

A. That is Class 45 on the 40,000, and eighty per cent of 45 on the excess.

Q. That is 36 on the excess? A. Yes.

Q. And can you compute the payment on the 90,000-pound car there according to the March 4, 1955 rate?

A. That is $1701.

Q. And how about on the April 4, 1956 date?

A. $1,036.

Q. Now, the railroads that participated in that quotation, do you see those on Appendix A, Mr. Hummer? A. Yes.

Q. Will you read off what those are?

Joliet Area 1 and 2.

A. Atchison, Topeka and Santa Fe; Chicago, Burlington and Quincy; Chicago, Milwaukee, St. Paul and Pacific; Chicago and North Western; Chicago, Rock Island and Pacific; Missouri-Kansas-Texas; Missouri Pacific; St. Louis, San Francisco; and Wabash.

5960 Q. What is the next pair of points?

A. From Joliet Arsenal, Areas 1 and 2, Illinois, to Firestone and Mead in Nebraska.

Q. What were they to?

A. Firestone and Mead.

Q. Now, the March 1, 1955 rate was what?

A. $1.50. That is a specific quotation.

Q. That is not a class rate.

And then what was the April 4, 1956 rate?

A. $1.24 on 40-thousand, and $1.00 on the excess.

Q. And were those class rates?

A. Yes, that was forty-five on 40-thousand and thirty-six on the excess.

Q. Could you give me the 90-thousand car rate on that March 1?

A. $1,350.00.

Q. And on the April 4, 1956 rate?

A. $996.00.

MR. FLYNN: Your Honor, I would like to point out that this answer also specifies that Government regulations did not permit entrance into this particular destination of a load in excess of 50-thousand. So, while we do not object to comparing the rates on 90-thousand they are unrealistic and do not relate to the rail movement.

THE COURT: Mr. Wright, would you accept that?

5961 MR. WRIGHT: Yes, surely. The purpose of using the 90-thousand is because I believe it appears in evidence here as the closest figure to the average rail car loading which I think is 87-thousand.

It is true there may be circumstances where they could not carry the 90-thousand load.

MR. GATES: Your Honor, I did not know that ninety was the closest to 87. I thought 87 was the closest to 87. There is no evidence in this record which says the average is 90-thousand.

MR. WRIGHT: Well, let's say it is the closest for purposes of quick computation.

THE COURT: Let's stay with the record, whatever the record shows.

BY MR. WRIGHT:

Q. Did you name the railroads, Mr. Hummer? A. No.

Q. Have you got those?

A. To Firestone, Nebraska, the Atchison, Topeka & Santa Fe, Chicago, Burlington & Quincy, and Union Pacific. That is from Area 1.

From Area 2 to Firestone, the Chicago, Burlington & Quincy, Chicago, Milwaukee, St. Paul & Pacific, Union Pacific, and Wabash.

From Area 1 to Mead, the Atchison, Topeka & Santa Fe and Union Pacific.

5962 From Area 2 to Mead, the Chicago, Milwaukee, St. Paul & Pacific, Union Pacific, and Wabash.

Q. What is the next pair of points you have?

A. Joliet, Areas 1 and 2, to Atlas, Ohio, Ravenna Ordnance Plant.

Q. Atlas, Ohio? A. That is right.

Q. Was that Ravenna Ordnance? A. Yes.

Q. Will you give me the rates on the same dates again, March 1, 1955 and April 4, 1956?

A. March 1, 1955, the rate was $1.587 which is the 65 per cent rate.

Q. And the April 4, 1956 rate?

A. April 4, 1956, it was $1.10 on 40-thousand, and eighty-eight on the excess.

Q. Now, those are class rates?

A. Yes, that is Class 45 for the 40-thousand, and 36 for the excess.

Q. Can you compute those characters on the 90-thousand pound shipment?

A. Under March 1 it is $1,428.30, and April 4 it is $880.00.

* * *

5986 DIRECT EXAMINATION OF MR. HUMMER BY MR. WRIGHT

Q. Mr. Hummer, could you mark out for us on the map, Plaintiff's Exhibit 2, the list of explosives route, the area in which the 45 per cent, 36 per cent rate finally became effective after the quotation of April 3, 1956, which I think is in evidence as Exhibit 203? Do you understand what I am asking you to do?

A. Yes. With certain exceptions, which I will state--

Q. I would appreciate it if you would mark lines as you are testifying and put the line on the map that defines the areas that you are talking about.

A. This being a road map, I can't follow the railroad line but I will put it as near as I can.

Q. If you can get an approximately accurate line there.

A. (Drawing certain lines on Plaintiff's Exhibit 2.)

MR. BALL: If the Court please, I wonder if the witness is responding to Mr. Wright's question which I thought related to rates in October of 1955?

5987 MR. WRIGHT: I thought my question was reasonably clear. This is supposed to show the situation after the April 3rd quotation went into effect.

THE COURT: Is that 1955?

MR. WRIGHT: April 3, 1956. This is the ultimate result of the October 22 reduction, the March reduction and the April 3rd reduction.

THE COURT: All right.

THE WITNESS: After April 3rd, the 45 per cent on 40,000 plus 80 per cent of 45 on the excess --

THE COURT: You say April 3rd. Do you mean of 1956?

THE WITNESS: April 3rd, 1956, after that.

That basis was in effect in the entire territory east of this line beginning at Duluth, Minnesota, coming down to just north of Minneapolis, and north of the Chicago, Milwaukee, St. Paul & Pacific Railroad, through the northeast corner of South Dakota and the southwest corner of North Dakota, following west of North and South Dakota and then coming into Wyoming to include Sheridan and Casper, down to Cheyenne, then following the Colorado and Southern Railroad down through Denver to Trinidad, Colorado, and the Santa Fe Railroad down through Albuquerque including Santa Fe, New Mexico and to El Paso, Texas --

BY MR. WRIGHT:

Q. Excuse me. Could you continue that blue line so that we all know you are talking about the same line?

5988 A. Yes. (Drawing lines on map.)

Including all the territory south and east with one exception that it did not apply between Southern Territory, which is the territory south of the Norfolk & Western and Virginian Railways and Ohio east of the Mississippi--between Southern Territory and Southwestern Territory, which is west of the Mississippi, south of this black line through the middle of Missouri, including Oklahoma, Texas and the section of New Mexico east of the line which I have just described. With that exception between Southern Territory and Southwestern Territory, the Class 45 for 40,000 plus 80 per cent of Class 45 for the excess over 40,000 was in effect after April 3, 1956.

Q. How about movements from that area that is south and east of the blue line to areas west of the blue line? What was the rate situation as to those after the April 3rd quotation?

A. There is a little difference -- You are speaking of from east of the line to west of the line?

Q. Yes, that is what I had in mind.

A. That is Class 55 with the exception of between Southern Territory and territory west of that line is still on the old Class 65 basis.

Q. And how about shipments within the area that is west of the blue line?

5989 A. I might add that between Southern Territory and Southwest, that is still on the 65 basis. That is what I said was excluded from the 45.

Q. Yes.

A. Within the territory west of this black line coming straight down North and South Dakota to the Union Pacific into a small corner of Wyoming to Cheyenne and then following the same line as above, you have that scale which was included in the appendix to the report.

Q. That was a specific scale for that area?

A. That was a specific scale. That has never been changed and had not at that date.

Q. Now, after we adjourned last week, did you, Mr. Hummer, make the same computations that we have on the board here with respect to all the other points covered by that interrogatory answer that you had of the Western Railroads?

A. Yes, I did.

* * *

5991 Q. Now, do you have a work sheet which shows your calculations on it?

A. Yes.

Q. Did you check the calculations this morning against the charts?

A. I did.

Q. These first down to Joliet to Atlas, Ohio -- those were the points, I think, that were referred to last but there weren't any percentage computations there. Did you check those percentage computations too?

A. Yes.

Q. Did you find any errors in the chart as prepared and what you have on the sheet there?

A. Yes. On the fourth pair of points, that 28 per cent should be 26 per cent; otherwise, it is correct.

Q. Now, I think you covered, Mr. Hummer, the participating railroads on the points we had on the blackboard which were Joliet to Atlas, Ohio.

Can you state them for this next one Avondale to Charlestown-Watson, Indiana?

A. Which one is that?

Q. Avondale, Colorado and Charlestown-Watson, Indiana, Arsenal.

5992 A. That is the Atchison, Topeka & Santa Fe; Chicago, Burlington & Quincy; Chicago, Milwaukee, St. Paul & Pacific; Chicago and Northwestern; Chicago, Rock Island & Pacific; Illinois Central; Missouri-Kansas-Texas; Missouri Pacific; St. Louis-San Francisco; and Wabash.

MR. BALL: If the Court please, for clarification to the jury, I wonder if the witness wouldn't bring out the fact that when he reads a number of railroads it doesn't mean that all those railroads are quoting the rate between the two points, but it will cover joint rates where it takes two or three railroads sometimes to complete the trip.

THE COURT: Is that the fact, Mr. Hummer?

THE WITNESS: They are all quoting the rate as I understand it. Their own rails don't run between the two points; it is a joint rate, but they all participate.

MR. BALL: The point I want to bring out is not all of those, maybe only one of that group actually served at one of the points and another one served another. There are various ways of routing.

THE COURT: Maybe we can agree on a stipulation.

BY MR. WRIGHT:

Q. I take it what you are reading from, Mr. Hummer, are part of the answers and this is what the defendants themselves called participating

5993 railroads; is that correct?

A. (Reading) "List of Western Railroad defendants participating in rates on ammunition and explosives from and to points shown on Appendix B of Plaintiff's Interrogatories, dated December 17, 1959."

MR. WRIGHT: The defendants' own description is participating railroads.

* * *

6003

BY MR. WRIGHT:

Q. Tell me what the answer is to Interrogatory I D(1) which is, and I'll read it: "On April 3, 1956, were you a party to any one of the following tariffs, 1) WTL Tariff W-1000, Agent W. J. Prueter's ICC No. A-3929?"

What is the answer to that question?

A. (Reading) "Participating Western railroad defendants The Atchison, Topeka & Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Chicago and Northwestern Railway Company; Chicago, Rock Island & Pacific Railroad Company; Great Northern Railway Company; Illinois Central Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; Union Pacific Railroad Company; Wabash Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company."

Q. Will you count those? Do you know the number of railroads you just read there?

I think that includes all of the 15 Western railroad defendants but I'm not sure.

6004 A. There are 14 listed here. The Southern Pacific is not in there, being a Southern --

Q. All of them except the Southern Pacific?

A. Yes, they are not in this tariff.

Q. Would you read the answer to the next one, number 2, which is: "On April 3, 1956, were you a party to any of the following tariffs, 2) WTL Tariff S-1001, Agent W. J. Prueter's ICC No. 3930?"

A. (Reading) "The Atchison, Topeka & Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Chicago and Northwestern Railway Company; Chicago, Rock Island & Pacific Railroad Company; Great Northern Railway Company; Illinois Central Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; Union Pacific Railroad Company; Wabash Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; Southern Pacific lines, only Texas & New Orleans Railroad Company."

Q. That, I take it includes all of them. Do you have 15 on that one? Would you count them up?

A. Yes, 15.

MR. WRIGHT: Now, I can go through the rest of these but I think it is perfectly clear that all of the 15 defendants were a party to one

6005 or more of these tariffs.

THE COURT: Has it been established that all 15 of the Western railroads were parties to matters that are shown or reflected on Plaintiff's Exhibit 210, under the title "Western Railroads Dollar and cents Quotations Between Specific Points"?

MR. WRIGHT: That is true with this qualification: As pointed out in the answers to participating railroads, there were only certain of them that participated in the quotations between these points, but all of them participated in some degree in movements between some of the points.

* * *

6009 Q. Now, did you also check, Mr. Hummer, this page two that shows the additional western points?

A. Yes, I did.

6010 Q. And are those figures on there correct? A. They are.

Q. Now, if you will just read no more than the points and the railroads that are listed as participating in -- participating railroads between those points and then the percentage figure decrease in the last column, I think we can get through very quickly.

The first point there is Charlestown-Watson, Indiana Arsenal, and Parsons, Kansas, Kansas Ordnance.

A. You want the railroads?

Q. Just those listed as participating railroads, and then read the percentage figures.

A. Atchison, Topeka and Santa Fe; Chicago, Burlington and Quincy; Chicago, Milwaukee, St. Paul, and Pacific; Chicago and North Western; Chicago, Rock Island and Pacific; Illinois Central; Missouri, Kansas, Texas; Missouri Pacific; St. Louis, Southwestern; Wabash.

That is 31 percent decrease.

MR. BALL: I object to the witness going on to the matter of the percentage of decrease because I think it is meaningless in view of the arbitrary way in which--

THE COURT: I will permit you to cross examine him on that. You can bring that out. Overruled.

BY MR. WRIGHT:

Q. Now, would you just give us the participating railroads

6011 from Charlestown, Indiana, Indiana Arsenal, to Sidney, Nebraska, Sioux Ordnance?

A. Atchison, Topeka and Santa Fe; Chicago, Burlington, and Quincy; Chicago, Milwaukee, St. Paul, and Pacific; Chicago and North-Western; Chicago, Rock Island and Pacific; Illinois Central; Missouri, Kansas, Texas; Missouri Pacific; St. Louis, San Francisco; Union

Pacific; Wabash.

Q. And the percentage decrease?

A. 45 -- 43, I am sorry.

Q. From Charlestown, Indiana, Indiana Arsenal to Defense, Texas, Lone Star Ordnance.

A. Atchison, Topeka and Santa Fe; Chicago, Burlington and Quincy--

* * *

6018 Q. Will you just read, Mr. Hummer, from the answers to the interrogatories that you have in front of you there, the four railroads that are not listed as participating railroads in the answer as between any of these points that the interrogatory answer lists.

A. Great Northern, Northern Pacific, Southern Pacific, and Minneapolis, St. Paul, and Sault Ste. Marie.

Q. Now, would you indicate on the map, please where those railroads ran generally, just indicate to the Court where those four railroads that you just named had their lines.

A. (Using pointer on map.) The Northern Pacific and the Great Northern run out through this northern territory and on out to the Pacific Coast and the western territory.

Soo Line also runs up into this northern territory. The Southern Pacific runs out into the southern part of the western territory.

Q. Now, did you cover all the four roads? A. Yes.

Q. The Southern Pacific, Northern Pacific, Soo Line, and Great Northern, is that right?

A. Great Northern, yes.

Q. You have indicated generally the areas that those lines serve.

6019 A. They do come out of Chicago, but run out, as I have indicated; the Southern Pacific comes out of New Orleans into the Western territory.

Q. Now, I will ask you, if you will, Mr. Hummer, to save time, when you refer to the participating railroads between these points, just give the number of the 11 that are left that participated.

You don't have to name the specific railroads. I gather that Mr. Ball doesn't have any particular interest in the specific railroads, so if you will -- did you cover that first point on this page 2?

Miss Reporter, can you give us the last points that you have in your transcript there.

(Whereupon, the reporter gave them "Defense, Texas, Lone Star Ordnance.")

MR. WRIGHT: Did he give the railroads and the percentage?

(Whereupon, the reporter said that some railroads were mentioned but no percentage.)

THE WITNESS: I believe I named only a couple of railroads.

BY MR. WRIGHT:

Q. Just give us the number of those 11. A. Eleven.

6020 Q. All 11 in that? A. Yes.

Q. Percentage decrease was what? A. 31 -- no.

Q. You have got it on your work sheet, haven't you?

A. Well, I was looking at this Appendix A.

MR. BALL: I object.

THE COURT: Mr. Ball.

MR. BALL: I object to the witness testifying that the percentage increase in this quotation was 31.

Why have computations based on a fictitious figure to get 31 for that one. It wouldn't be that more than any other figure.

THE COURT: Do you wish to change your statement?

THE WITNESS: I didn't think I said "increase." It was a decrease.

THE COURT: Are you referring to the top line there -- that says 31%?

MR. WRIGHT: I think the quotation that I asked about was Charleston, Indiana, Indiana Arsenal to Lone Star Ordnance, the third one down here.

THE COURT: The third one down.

THE WITNESS: That percentage is 44.

MR. BALL: I object again unless the witness specifies that that is on that particular fictitious round of pounds.

6021 THE COURT: Is that on the 90,000 pounds?

THE WITNESS: It is. All these percentages I am giving are on the 90,000 pounds.

THE COURT: That decrease is shown or reflected in the right hand column.

THE WITNESS: That is right.

THE COURT: You said 44 percent. What do you mean by that?

THE WITNESS: That is the percent that the rate on April 4, 1956 is a reduction from the rate that was -- that is the revenue in dollars is a reduction from the revenue in dollars on March 1, 1955.

THE COURT: Let me see if I can follow you. In dollars under the third line where 44 percent is on the right March 1, 1955, $2.35 is that it, Mr. Wright, for one hundred pounds? That would amount to $2115. Right?

THE WITNESS: Right.

THE COURT: Below there, stated April 4, 1956, then you have two figures, I think, 45 percent and 36 percent, and you have a figure of $1182. Correct?

THE WITNESS: That's right.

THE COURT: And you say that amounts to 44 percent decrease?

THE WITNESS: That's right. Deducting $1182 from $2115, and found what percentage that was of the $2115.

6022 MR. BALL: If the Court please, my objection goes to stating a percentage here because 90,000 pounds wasn't the amount,

and you have to have that 70,000 pounds -- entirely different --

THE COURT: Well, the amount mentioned, I think Mr. Wright took a round figure. The amount mentioned is -- the total given -- the Defense Department, I think said each carload would carry what -- 87,000 pounds?

MR. BALL: That is not in evidence.

THE COURT: Well, there has been some discussion.

MR. BALL: The discussion has come from counsel. Actually the figure that I can cite and show is, the answers here indicate that there was about 78,000 pounds on December, '54.

THE COURT: Let me ask Mr. Wright why he selected 90,000 pounds.

MR. WRIGHT: 90,000 pounds -- that figure was selected and it should be understood that none of these are actual shipments. All of these are quotations that we are talking about and it was necessary to select some uniform figure so that you could see what the difference in the quotation amounted to in terms of an actual reduction of price of a particular carload.

Now, these 90,000 -- the figure 90,000 was taken because, I believe, there is a figure in what was previously put in evidence here --
6023 a letter from Mr. Lindsay, in which he referred to certain figures distribution of shipments between rail and truck, about 80,000 pounds, 87,000 pounds and we picked the 90,000 figure as one which was convenient for comparison.

Now, it's perfectly true that as the weight of any shipment goes up, of course, the total cost of the carload is greater and the percentage differs, becomes greater.

And as the amount of the figure you used for a particular shipment went down, you would have lower percentage figures, if you used them, but these are all on a uniform basis of 90,000 pounds and whatever the effect of 50,000, 60,000, 70,000, 80,000 would be is a matter of simple calculation.

It will, of course, the percentage decrease would be less as you have carloads lower than 90,000 and it would be greater insofar as you have over 90,000.

THE COURT: I take it that counsel at the proper time will cross examine this witness as to his knowledge about the -- carrying 50,000 pounds, what would the rate be, decrease or increase.

All right. Let's proceed. They will have an opportunity to cross examine at the proper time.

BY MR. WRIGHT:

Q. Now, turn to the next one, Parsons, Kansas, Kansas Ordnance 6024 to Avondale, Colorado, Pueblo Ordnance, and if you will just give us the number of the railroads participating in that quotation in the answers and then give us the percentage figure.

A. Four railroads participated in that.

Q. And the reduction was what?

A. 47 percent.

THE COURT: Do you have the names of the railroads participating there?

THE WITNESS: Yes.

THE COURT: Well, give us the names.

MR. WRIGHT: Well, the only reason I omitted them was because Mr. Ball said that he didn't care whether --

THE COURT: Very well, let's don't put in any more than needed in the record.

MR. WRIGHT: To save time.

THE COURT: Very well.

BY MR. WRIGHT:

Q. And then did you give the percentage on that for the four participating railroads?

A. 47 percent.

Q. And then the next one, Parsons, Kansas, Kansas Ordnance,

to Panhandle, Sidney & Huntsman, Nebraska, Sioux Ordnance, how many railroads participated in that?

A. To Panhandle and Sidney, four railroads and to Huntsman, three.

6025

Q. Two points are really, no three points are Panhandle, Sidney and Huntsman, Nebraska, Sioux Ordnance.

A. Panhandle and Sidney are four railroads, but to Huntsman only three. The percentage is 43 percent.

Q. Now about between Sunflower Ordnance in Parsons, Kansas and Tooele, Utah?

A. Seven railroads and the percentage is -- now there is a notation on the answer --

Q. This star here says "Deduction of $15 per cwt on traffic to or from igloos at Warner, Utah. That appears on the answer, does it?

A. Yes, it does. The rate given is $3.58 and I figured it out on that basis and I also figured it out on $.15 less, or $3.43, resulting in 15 percent in the first instance and 18 percent in the second.

Q. I see you figured it both ways. Without the $.15 deduction you would have 15 percent figure, and the 18 percent figure, if you take the $.15 reduction?

A. That's right.

Q. Now, these points here, is that point Warner, Utah, within the area that you indicated by the blue line there or is that the other side?

A. That's beyond. West of that line.

Q. Now, is that the only point that appears in the interrogatory

6025-A

answers there, which is outside of the territory you indicated by the blue line that the territory itself is east of the blue line?

A. I think it is, yes.

Q. That Warner, Utah is the only point outside that area, is that correct? A. Yes.

Q. Now, the third sheet of the chart, western railroads charts, and I ask you if you can start there with the Sunflower Ordnance to Shumaker, Arkansas, and just give the number of railroads and the percentage of decrease.

A. Seven railrods, percentage decrease, 51.

Q. How about the Sunflower Ordnance to Joliet Arsenal?

A. To Joliet area 1, one railroad; Joliet area 2, three railroads.

MR. WRIGHT: I think we might indicate to the jury in the record that the witness is now referring to Plaintiff's Exhibit 211, isn't it?

MR. WRIGHT: That is the third page of Exhibit 211.

THE COURT: Third page.

BY MR. WRIGHT:

Q. Take the Sunflower Ordnance to Kingsbury Ordnance, did you give that?

A. No, I didn't give the percentage on the Joliet Arsenal, 42 percent.

6025-B Now, Kingsbury, 10 railroads, percentage of decrease, 43.

Q. And the next one, Sunflower Ordnance to Burlington, Iowa?

A. Two railroads, percentage, 38.

Q. And Ravenna Arsenal to Black Hills Ordnance?

A. Ten railroads, 47 percent.

6026 Q. The Army Chemical Center, Edgewood, Maryland to Sunflower Ordnance, DeSoto, Kansas.

A. 10 railroads and 40 per cent.

Q. Army Chemical Center, McAlester, Oklahoma?

A. 11 railroads, 38 per cent.

Q. Now, all those ports shown on that page, are those within the area south and east of the blue line on Exhibit 2 there, are they?

A. Yes, they are.

Q. And I will show you the page 4 of this exhibit. That is

also true of these points on the fourth page too, is it?

A. McAlester, Oklahoma, to Indian Head, Maryland.

Q. How many railroads in that? What would the percentage be?

A. 11 railroads, but they have a notation on two of them that says, "The lowest available Section 22 rates applied only via Chicago, Rock Island and Pacific west of Chicago, and Chicago, Rock Island and Pacific, or Missouri, Kansas and Texas west of St. Louis.

Q. Does that apply on both the dates, March 1, 1955 and April 4, 1956? A. Yes.

Q. And what was the percentage there? A. 38.

6027 Q. And the next one, McAlester, Oklahoma, to Hingham, Massachusetts.

A. 11 railroads, 45 per cent.

Q. And then from McAlester, Oklahoma, to Earle, New Jersey?

A. 11 railroads, and has that same notation with regard to the Rock Island and the M.K.T., and it's 47 per cent.

Q. The same notation applies on both dates there?

A. On those two, the Indian Head and the Earle.

Q. Then, McAlester, Oklahoma, to St. Juliens Creek, Portsmouth, Virginia, what is it?

A. 11 railroads, and it has another notation:

"Available Section 22 rates applied only via C.R.I. & P., and M.K.T.. west of St. Louis and C.R.I.&P. west of Memphis."

Q. The percentage there?

A. The percentage is 37.

Q. And then Holston Ordnance, Holston, Tennessee, to Kansas Ordnance, Parsons, Kansas?

A. 6 railroads, 41 per cent.

* * *

6033 BY MR. WRIGHT:

You have copies, have you, Mr. Hummer, of these answers which have been marked in evidence here as 209, 209-B and -C?

A. Yes, I have.

Q. And did you make a similar computation with respect to the data that appears in those answers? A. I did.

Q. Similar to this chart that is presented here as 210 and 211?

6034 THE WITNESS: I did.

THE COURT: You didn't hear that?

MR. SHEA: Well, that wasn't the question.

THE COURT: Suppose you repeat it again. You will save time.

MR. WRIGHT: It would be simpler if I had the chart marked for identification.

THE COURT: Very well, let's do it that way.

6035 MR. WRIGHT: Would you please mark with the next number this chart that is headed, "Dollars and cents quotations between specific points,

taken from interrogatory answers of B. & O., Erie, New York Central and Pennsylvania Railroads."

THE CLERK: Plaintiff's Exhibit No. 212 for identification.

(Thereupon chart, Dollars and Cents quotations between specific points, from interrogatory answers of B. & O., Erie, N.Y.C. and PRR., was marked Plaintiff's Exhibit No. 212 for identification.)

BY MR. WRIGHT:

Read me the exhibit number of the answers of B. & O., Erie, New York Central and Pennsylvania Railroad. Do you have those there in front of you, Mr. Hummer?

A. No, I don't have them here.

MR. GATES: It is 209.

MR. WRIGHT: I have them here (handing).

That is 209.

MR. McGLOTHLIN: Yes, 209.

THE WITNESS: That is 209.

BY MR. WRIGHT:

Do you have the C. & O. number there? A. 209-B.

Q. And the Southern number? A. 209-C.

6036 Q. I will show you this chart which has been marked for identification as 212 and ask you if this is the chart that you were referring to that you prepared from those interrogatories that are referred to there? A. It was.

* * *

6040 Q. Is there anything on the first page of the exhibit that didn't come from the interrogatories answers of B. & O., Erie, New York Central and Pennsylvania Railroad, that are in evidence as Exhibit 209?

A. No, they all came from Exhibit 209.

Q. Now, as far as the second page is concerned, will you just indicate there the only points that came from the Southern Railroad answer?

A. That's the last one, from Holston, Tennessee, to Kansas.

Q. This is the one at the bottom here.

A. Yes, the one at the bottom.

Q. Can you indicate which, if any, on here, came from the C. & O. answer?

A. All of the rest of them were from 209, but the C. & O. had the exact same movement on two of them, and the same rates.

Q. Which were those?

A. The next to the last one, McAlester, Oklahoma, to St. Juliens Creek, and the other one is on the other side of the chart.

6041 Q. This McAlester, Oklahoma to St. Julien's Creek, the figures you have here appeared in the points on both the answers of the C. & O. and on the B. & O., Pennsylvania, Erie, New York Central answer. Is that right?

A. That's right.

Q. And is there another one like that?

A. One on the other side of the chart.

Q. Which one was that?

A. The fifth one:

"N.A.D. Crane, Indiana, to St. Juliens Creek."

Q. St. Julien's Creek? The one down at the bottom here?

A. Yes, the one down at the bottom.

Q. That appeared, you say, on both the Exhibit 209 and 209-B; is that right?

A. That's right.

MR. WRIGHT: With that background, I think Your Honor will see why we felt it was proper to put all of these on one chart. There was no use making duplicated charts or making up a whole board for them.

THE COURT: Apparently, Mr. Wright, what you have done is taken the information which you have obtained from the answers to various interrogatories that were propounded to various defendants -- correct?

MR. WRIGHT: Yes.

6042 THE COURT: You have taken those answers and the information that you got from those answers and put it on that board, or that chart there?

MR. WRIGHT: That's right.

THE COURT: Which is known as what exhibit?

MR. WRIGHT: This exhibit has been marked for identification 212. What you have in front of you is page 1.

THE COURT: The 90,000 pounds is an arbitrary figure which you selected; correct?

MR. WRIGHT: Correct.

THE COURT: That was not obtained by interrogatory or answer?

THE WITNESS: We also selected the dates here.

THE COURT: All right. And you did not obtain any percentages of decrease in revenue from the defendants; correct?

MR. WRIGHT: That's correct.

THE COURT: The percentages have been arrived at by computation, arithmetic or whatever you want to call it, by the witness; correct?

MR. WRIGHT: That's true also of the figures in the fourth column, under the item "90,000 pounds." Those are computations made by the witness in the manner he described at length here when we went into the first chart.

6043 THE COURT: All right.

Now, Mr. Shea.

MR. SHEA: Well, Your Honor, we can't sacrifice truth to

Mr. Wright's convenience:

Maybe it is more convenient for him to have only one chart instead of three charts, but the fact of the matter is that he wanted a chart which truly told the jury the relationship of Southern to anything on this. He had to just cut this off right here and put a new heading on it then.

THE COURT: Mr. Shea, let me make this suggestion, I think I understand you.

I am going to require counsel for defendants to wait until he has completed his direct examination, and then you may ask him any questions which the Court feels are pertinent.

All right. I think that's the only way to handle it.

BY MR. WRIGHT:

Now, again, Mr. Hummer, all of the points that are on both pages 1 and 2 of this chart which has been marked for identification as Exhibit 212, were those in the area on the map, Exhibit 2, that is south and east of the blue line?

A. Yes, they were.

6044 Q. And that was the area, was it, where I think you previously testified this rate of 45 per cent on the first 40,000 and 36 percent on the excess in the same car was put into effect finally upon the April 3rd quotation? A. Yes.

Q. Now, if you will just start at the top point there, Pueblo Ordnance, Indiana Arsenal --

Well, in this case there will be a small number of railroads, so if you will just read the railroads that are listed as participating in each one, and then the decrease:

First, take Pueblo Ordnance to Indiana Arsenal.

A. Baltimore & Ohio and Pennsylvania Railroad, percentage decrease 49 per cent.

Q. And Joliet Arsenal to Ravenna Ordnance?

A. Baltimore & Ohio, Erie, and Pennsylvania, 40 per cent.

MR. McGLOTHLIN: From what is the witness reading, Your Honor?

THE COURT: What are you reading from, Mr. Witness?

THE WITNESS: From Exhibit 209.

MR. McGLOTHLIN: You see, that's what I am afraid of. That gives an erroneous impression. It is quite true that two of the three that
6045 he has mentioned --

THE COURT: Are you objecting now, Mr. McGlothlin?

MR. McGLOTHLIN: I object to the question, and to the answer, as misleading.

The witness is quite aware, or I believe he is, that these are not the only railroads which had that rate. They happened to be the only defendants that had that rate.

THE COURT: Do you object on that ground?

MR. McGLOTHLIN: Yes, sir.

THE COURT: What do you say to that, Mr. Wright?

MR. WRIGHT: All that we are purporting to chart here is what we have in the defendants' answers. We are not purporting to give any information as to what any other railroad did who is not a defendant.

THE COURT: And you are reading from the interrogatories?

THE WITNESS: From the answers to the interrogatories.

THE COURT: Yes.

I will overrule your objection.

MR. SHEA: I just wondered whether we might hear what the question and answer were.

THE COURT: All right. Do you recall the question or do you want it read?

6046 MR. SHEA: I would like to hear it read. I just wondered whether--

THE COURT: Mr. Reporter, could you find that part?

(Question and answer read:)

MR. SHEA: This emphasizes what railroads participated in this rate.

He names three. I don't know how many there really were.

If he wants to frame his question --

THE COURT: That is the point, Mr. Wright:

As I understand it, that's the point of Mr. Shea's objection.

But it seems to me that on cross examination you can inquire as to how he arrived at this conclusion or the conclusion he gave, and bring all those things out on cross examination.

MR. SHEA: I see.

THE COURT: You will permit them an opportunity to do that, which they are entitled to, of course.

MR. WRIGHT: I think my question was clearly worded to refer to the answer of these defendants to Exhibit 209.

If it isn't, Mr. Hummer, I want to make clear what I expect you to read here as what you find on those interrogatory answers that are listed

6047 on the chart as to each of those points.

THE COURT: All right, let's proceed.

BY MR. WRIGHT:

Q. I think you covered Joliet to Ravenna:

Now, on Crane to Earle, what railroads do you find listed on any of these interrogatory answers, 209-A, 209-B or 209-C, as participating in the quotation between those points?

A. Baltimore & Ohio, Erie, New York Central, Pennsylvania.

Q. And the percentage on that?

A. The percentage, 5 per cent.

Q. On this Crane, Indiana, to Mifflin, Pennsylvania?

A. Baltimore & Ohio, Erie, New York Central, Pennsylvania.

Q. And the percentage?

A. 26 per cent.

Q. And Crane to St. Juliens Creek?

A. B. & O., Erie, Pennsylvania and also appears on the C. & O. 209-B, I believe that is, and the percentage is 3 per cent.

Q. I will ask you the same question about page 2 here:

The first one is Indiana Arsenal to Pueblo Ordnance.

6048 A. Baltimore & Ohio and Pennsylvania Railroad. Percentage, 39.

Q. And the next one, Indiana Arsenal to Picatinny Arsenal?

A. Baltimore & Ohio, Erie, New York Central, Pennsylvania. The percentage is 31.

Q. And Sunflower Ordnance to Kingsbury Ordnance?

A. Baltimore & Ohio, and the percentage is 39.

Q. And Ravenna Ordnance to Black Hills Ordnance?

A. Baltimore & Ohio, Erie, Pennsylvania; percentage, 46.

Q. And Army Chemical Center, Edgewood to Sunflower Ordnance?

A. Baltimore & Ohio, Erie, New York Central, Pennsylvania. The percentage, 40.

Q. And McAlester, Oklahoma, to St. Julieans Creek?

A. Baltimore & Ohio, Erie, New York Central, Pennsylvania, and it also appears on the C. & O. answer, with 36 per cent.

Q. And the last one, Holston Ordnance to Kansas Ordnance?

A. That's Southern Railway, on Exhibit 209-C, and the percentage is 42.

Q. I notice on both pages of this chart the column "Class"

6049 is left blank.

Is there any information in those interrogatory answers which will tell you what the class rate, if any, was, in those?

A. Not directly, but they are 40,000 pounds, and the rate on the excess indicates that it is the same quotation of 45 percent on 40,000 and 36 per cent on the excess.

Q. You are talking about these figures for April 4, 1956?

A. Yes.

Q. As of that point there?

A. There is nothing to indicate what the percentage was on March 1, 1955.

* * *

DIRECT EXAMINATION OF MR. TAIT

BY MR. WRIGHT:

* * *

6160 Q. Mr. Tait, I show you there the volumes of Schedule "B" that have been marked for identification as 37-A, B and C and I ask you if you are familiar with those? A. I am.

MR. WHEELER: Your Honor, I thought there were four volumes of that and I only have three marked.

THE COURT: 37-A, B and C. How about 38-A, is that what you called it?

MR. WRIGHT: I am sorry, Your Honor. There is 37, 37-A, 37-B and 37-C which makes up the four volumes.

THE COURT: All right.

MR. WHEELER: What are the page numbers, then, on Exhibit 37?

THE COURT: Do you have that?

THE WITNESS: 37-A here, I have pages 1 through 216. Does that check?

MR. WHEELER: Yes.

THE WITNESS: Do you want any more?

MR. WHEELER: I wanted 37. I assume it is volume 4.

THE WITNESS: 37 is pages 815 through 1132.

MR. WHEELER: Thank you.

MR. WRIGHT: Would you read the last question and answer, please.

(The record was read by the reporter.)

6161 Q. Did you supervise the preparation of those schedules?

A. I did.

Q. Now, can you describe for us what the schedules themselves show and the underlying documents that they reflect? Just begin with the first column there and run across, if you will, or take whatever the first point you have and please explain it in concrete terms what is shown there, what it means, what the underlying document is that it comes from.

A. Column 1 shows the origin of the shipment. Column 2 shows Riss portions of the gross revenue in cents per hundredweight on interline shipments.

THE COURT: Will you explain again what you mean by interline shipments. The jury has heard it but I think it would be well to tell them again what it means.

THE WITNESS: An interline shipment, Your Honor, is one where two or more carriers participate in the handling of a single shipment from a given origin to a given destination.

THE COURT: All right.

MR. McGLOTHLIN: May I ask a question, Your Honor?

THE COURT: You may.

MR. McGLOTHLIN: I will address it to Your Honor. My recollection is when either Mr. Moody or Mr. Riss was on the stand, I am not sure which, they made a distinction. They said interline was where you took the cargo out of your trailer and put it in somebody else's
6162 trailer, and interchange was where a single trailer was -- your trailer, for instance -- was detached from your tractor and the other man hooked it on to his tractor and went on.

What I would like to have clarified now is Mr. Tait's use of the word "interline" restricted to unloading one trailer and putting it into another or is it synonomous with interchange, or does it cover both?

THE COURT: Can you answer that question, Mr. Tait?

THE WITNESS: It's synonomous with interchange.

THE COURT: All right.

THE WITNESS: Column 3 shows the destination of the shipment.

Column 4, the letter "A" indicates shipment received by Riss from the interline carrier and delivered by Riss to destination. That is, "A" was used to indicate advance. The letter "B" indicates Riss originated the shipment and interlined the shipment to another carrier for further transportation to destination. "B" being beyond Riss. The letters "AB" indicate the shipment neither originated nor delivered by Riss. Absence of "A", "B" or "AB" indicates Riss transported the shipment from origin to destination.

Column 5 shows the Government bill of lading number except the three-digit figures in this column are Riss I.B.M. code numbers for
6163 destination points.

Column 6 shows Riss revenue freight bill number.

Column 7 shows the weight in pounds on the Government bill of lading.

Column 8 shows the rate in cents per hundredweight from origin to destination.

Column 9 shows revenue in dollars and cents received by Riss for the portion of the transportation performed by Riss.

Column 10: a single asterisk in column 10 indicates monthly total appearing on the same line in columns 7 and 9 between the origin and destination. A double asterisk in column 10 indicates a yearly total appearing on the same line in columns 7 and 9 between the origin and destination. A triple asterisk in column 10 indicates a total in the entire period 1949 through 1957 appearing on the same line in columns 7 and 9 between the origin and destination. Too, in column 10, the last digit indicates the year; the digit or next two digits to the left indicate the day of the month; and the last remaining digit or digits indicate the month shown on the Government bill of lading or Riss revenue freight bill.

Now, just for an example, "10-20-5" indicates October 20, 1955; "1-6-3" indicates January 6, 1953.

* * *

6165 Q. I think, Mr. Tait, it would be helpful if you just take the first point you see there, any point, and read it across. Read what is actually there and then explain exactly what that says about the underlying documents. Start at the left and read it across at some point.

A. The first entry on page 1 of Exhibit 37-A shows a record

6166 of a shipment moved from Shumaker, Arkansas, Naval Ammunition Depot to Port Chicago, Naval Magazine at Port Chicago, California. It shows that the shipment consisted of a weight of 41,430 pounds; that the rate from origin to destination assessed on that shipment was $4.45 a hundred. The shipment moved October 20, 1955. Riss received as its portion of the haul $424.04, or an average rate of $1.02 per hundred.

That is as far as the exhibit goes as I can understand it.

Q. Does the exhibit indicate there anything as to who originated the shipment and who terminated it?

A. It does not.

Q. On that particular line there, I understood your other testimony said that there was an "A" or a "B", a symbol that was used where you had another carrier that originated or delivered.

A. I am sorry, I misunderstood your question. Yes, there was an origin carrier, an interline, and there was a beyond carrier, an interline. Riss was a bridge carrier; Riss was in the middle.

Q. And that is indicated how on the exhibit you have in front of you?

A. That is indicated under column 4, showing "AB", showing

6167 an advance carrier or a carrier originating the shipment, and a beyond carrier performing the delivery.

Q. Have you got one in front of you there where Riss originated and somebody else delivered to show how that is indicated?

A. We may go to page 23 of Exhibit 37-A and the first

entry on that page recording a movement from Pueblo Ordnance Depot, Colorado to Camp Chaffee, Arkansas. It shows a "B" which indicates that Riss originated the shipment and gave it to a carrier to deliver it beyond the line of Riss.

Q. Can you pick out one where somebody else originated the shipment and Riss delivered it?

A. On page 22 of Exhibit 37-A, the first entry shows a movement from Saugus, California to Crane NAD, Indiana, and that shows an "A" or an advance carrier or a carrier that delivered it to Riss and Riss performed the delivery at destination.

Q. Have you got one where there is no symbol, there, or where Riss both originated and delivered?

A. On page 24 -- make it page 25 of the same exhibit, the first entry, from Pueblo Ordnance Depot, Colorado to Joliet Arsenal, Illinois, shows Riss as the originating and delivering carrier.

Q. In that case there was no other carrier that participated in the shipment, is that right?

6168 A. That is right.

Q. If another carrier participated at the origin of the shipment, you indicate that by which letter?

A. By an "A".

Q. And if another carrier participates in the delivery, you indicate that by what letter? A. By "B".

Q. And if other carriers are involved in both origin and delivery, you put which letters down there? A. "AB".

Q. Now, how have you got the origin points arranged there in those schedules?

A. We arranged them, or attempted to but were not wholly successful, in alphabetical order by states, that is, the states were in alphabetical order.

Q. You began with Arkansas then. And how about the points, origin points within the state? Are they in alphabetical order or how did you arrange those?

A. We attempted to alphabetize the points in the states as well as the states themselves.

Q. That is the origin point, is that right?

A. That's right.

Q. The alphabetical arrangement, insofar as you have one, is confined to origin points; is that correct?

6169 A. That is correct. That is the basis on which we made it. We made it on forwarding basis.

Q. And those four schedules which you have in front of you there were made up from what basic documents?

A. They were made up from copies of the Government bills of lading, Riss rate bills and Riss cash books.

Q. Now, those documents are all in Kansas City?

A. Yes, sir.

Q. After this schedule was made up, do you know what if anything was done about making available those documents in Kansas City for inspection by the defendants?

A. It was my understanding they were made available to the defendants.

Q. For their examination for whatever checking they wanted to do? A. Yes, sir.

Q. Have you got included in those schedules -- Just tell us what shipments are included in this schedule, Revised Schedule "B", that is, in those volumes marked 37, 37-A, 37-B and 37-C?

A. These volumes show Class A and B explosives handled by Riss during the period 1949 through 1957. Included in those records are some references or some shipments or some portions of shipments of inert freight and some shipments of small arms ammunition which were mixed

with truckloads of explosives.

6170 THE COURT: Excuse me. You used the expression "Class A and B" explosives. Will you explain what you mean by that to the jury?

THE WITNESS: Yes. Under regulations promulgated by the Interstate Commerce Commission, explosives are classified into two classifications, that is, Class A and Class B. The more dangerous type, as I understand it, fall in Class A and the lesser dangerous type, that is speaking relatively, fall in Class B.

Quotations that we made and tenders to the Government on rates provided that they would apply on Class A and Class B explosives, and that is the records that we have made here. We have taken our Class A and Class B explosives. Small arms ammunitions falls in Class C which were not included in here, only to the extent that they were in with mixed shipments of Class A or Class B explosives.

THE COURT: I am just seeking information. What kind of explosives or ammunition would be considered as Class A explosives?

THE WITNESS: Black powder, for example, Your Honor, is a Class A explosive. Smokeless powder is a Class A explosive. A Class B explosive is ammunition fixed for cannon with sand loaded or an empty project.

MR. BALL: If the Court please, there is a very long classification by Class A and Class B which is an official record of the ICC, if the Court feels that will be useful.

THE COURT: It may be useful later. I just wanted him to tell the jury and the Court -- you gentlemen know what it means -- the difference between Class A and Class B quotation.

MR. BALL: The point is there were several hundred items of each classification. These just happen to be samples.

THE COURT: Thank you, Mr. Ball.

Let's proceed.

BY MR. WRIGHT:

6171 Q. Now, as I understand you, you have listed on those schedules there, that comprise the four volumes in front of you, all -- or is that confined to Government shipments, those exhibits?

A. Confined to Government shipments, yes.

Q. So that that includes, I take it, all of the Government shipments of Class A and B explosives that Riss & Company made during the years '49 through '57, is that correct?

A. Not exactly. That is, we used, in making up the record, all the bills of lading and the freight bills that we had actual possession of.

Q. There might have been some shipments that were made that aren't on there because you had somehow lost or mislaid the freight bill or the underlying documents?

6172 A. That is correct.

Q. But in any event it includes the schedule or record of all of the shipments that you had underlying documents to support, is that right? A. Correct.

THE COURT: Mr. Wheeler.

MR. WHEELER: I arise with some deprecation, but I think it might be interesting for the jury to know whether or not Class A and B explosives within the class there were different rates on different kinds of explosives.

THE COURT: I will let you develop that when your turn comes.

Let's proceed.

BY MR. WRIGHT:

Q. I would like to turn now to charts that were prepared on the basis -- You want to read, Mr. Tait, the preliminary. That is right.

MR. WRIGHT: There is a preliminary statement on the first page of the statement that describes what the limitations of the exhibit are. I would like to ask Mr. Tait to read that.

THE COURT: All right.

A. This is revised Schedule B entered in the record now as 37 and 37-A, B and C. Replaces and supersedes Schedule "B" attached to answers of Riss filed July 15, 1955, and all prior answers to interrogatories relating to amount of and revenues from transportation by Riss of explosives for the United States.

6173 This revised Schedule "B" contains information relating to shipments of Class A and B explosives by or in behalf of the United States, transported by Riss & Company, Inc., in direct or interline service, during the nine-year period January 1, 1949 through December 31, 1957. It includes shipments of Class A and/or B explosives mixed with small arms ammunition, and with inert freight. It includes shipments made by or in behalf of the United States under Government and commercial bills of lading. This schedule does not include shipments of small arms ammunition, of other Class C explosives, or other articles when not transported with Class A and B explosives. Revised Schedule "B" shows a total weight of 1,635,171,288 pounds.

Q. Excuse me, Mr. Tait. I think you have a typewriter written sheet there. You have some corrections? A. Yes, sir.

Q. First, read it as it is typewritten and then note wherever you have made a pencil correction there. A. Yes, sir.

6174 The original figure, before the one that I have just read, was 1,653,330,330 pounds. And the total revenues to Riss of $30,990,563,62, corrected to $30,984,046.56, for the nine-year period 1949-1957.

The total weight and revenue, for each of these years, is as follows. I will read the year first and then the pounds, and then the revenue:

1949 - 21,790,337 pounds; $395,079.96

1950 - 50,772,011 pounds; revenue, $711,278.73.

1951 - 118,335,200, corrected to 118,306,379 pounds; revenue, $2,014,688.53, corrected to $2,013,923.57.

1952 - 394, 084, 134 pounds; $7, 374, 734. 44.

MR. McGLOTHLIN: Could I have that last dollar figure?

THE WITNESS: $7, 374, 734. 44.

1953 - 606, 235, 533 pounds, corrected to 606, 117, 945 pounds; revenue --

MR. WHEELER: May I have that last figure again?

THE WITNESS: 606, 117, 945 pounds; revenue, $11, 460, 202. 61, corrected to $11, 455, 680. 54.

1954 - 194, 314, 448, corrected to 194, 314, 443; revenue $3, 611, 938. 41, corrected to $3, 611, 938. 41.

1955 - Weight, 166, 142, 321 pounds, corrected to 166, 112, 580; revenue, $3, 603, 581. 02, corrected to $3, 601, 427. 22

MR. WHEELER: May I have that last figure?

THE WITNESS: $3, 601, 427. 22.

1956 - 71, 327, 386; revenue, $1, 493, 269. 50.

6175 1957 - 12, 328, 965 pounds, corrected to 12, 346, 073; revenue, $325, 790. 12, corrected to $326, 714. 19.

* * *

REDIRECT EXAMINATION OF MR. HUMMER BY MR. WRIGHT

6896 Q. Can you point out on the map again what kind of movements are charted here?

This is between all territories and Mountain Pacific and Transcontinental Territories.

THE COURT: Mention the exhibit you are referring to, Mr. Wright.

MR. WRIGHT: That is 217.

THE COURT: Plaintiff's Exhibit 217.

MR. WRIGHT: Yes.

BY MR. WRIGHT:

Q. This is between, on the one hand, Mountain Pacific and Transcontinental, and on the other, all other territories?

6897 A. It is between points west of the blue line here, and west of the North Dakota State Line, and all other territories. That is, between points within that Territory and then those Territories and all the Territory east.

Q. That isn't very clear to me.

A. It does not include traffic within territory east of the blue line.

Q. Well, does it include movements both ways from the area east and south of the blue line, to the area west of it?

A. Yes, it does.

Q. Does it include anything else?

A. It includes traffic moving entirely west of the blue line.

Q. Entirely west of the blue line or else moving from west of the blue line to east of the blue line, or east and back; is that right?

A. Yes, and I want to qualify the blue line. We are not talking about this territory north of the blue line, just west of the blue line and continuing up to the border of North Dakota.

THE COURT: Are you rising to object, Mr. Flynn?

MR. FLYNN: I object to this witness' statement that that includes any traffic moving entirely west of the blue line.

6898 THE COURT: I assume you are going to want to ask some questions on cross examination.

MR. FLYNN: I think that exhibit shows on its face that they didn't have any authority west of the blue line.

THE COURT: I will let you develop that at the proper time.

Let's proceed.

MR. WRIGHT: I think it is perfectly obvious that Riss & Company didn't move anything west of the blue line.

THE COURT: Let's proceed.

BY MR. WRIGHT:

Q. In any event, Mr. Hummer, did the rate in this territory you have just described, west of the blue line and between the area west of the blue line and east of the blue line, did that rate ever go down to that 45-36 per cent level? A. No, it did not.

* * *

7215 CROSS EXAMINATION OF MR. TAIT BY MR. WHEELER

MR. WHEELER: 37, and 37-A, B and C, sir.

BY THE COURT:

Q. Now, were these prepared as a result of analyzing and inspecting each freight bill that has to do with hauling Government traffic?

A. Yes, sir.

Q. You had to take each bill; is that correct?

A. That is correct.

Q. And go through each one of them?

A. That is right.

Q. Is there any evidence in the case yet, or do you know, approximately how many of those freight bills were analyzed in order to prepare Plaintiff's Exhibits 37, through 37-C; is that right? In order to get some of the data that you have in those exhibits?

Do you understand the question?

A. Well --

Q. The freight bill would give all the information, wouldn't it?

A. Yes, sir, the freight bill and bill of lading, Your Honor.

7216 Q. All right. Now, approximately about how many of those freight bills or bills of lading were digested or analyzed in order to get this information that is contained in these IBM reports? Do you know approximately how many?

A. Well, if I understand you, we, as I said, we had some 40,000 bills that we had to go through and make the IBM cards on, for the run, to take this data off of them; and then when we went back through and revised it and checked it, that is the run we have here. We made two runs. This run we have here, and we went back and checked it, and we checked somewhere, I would say, between ten to twelve thousand bills, and we checked approximately 25 to 30 per cent of those shipments that are in here. That is a spot check.

Q. They all had to do with Government traffic?

A. That is correct; yes, sir.

Q. No other commodities?

A. No other commodities; no, sir. Q. All right.

A. Does that answer your question, Your Honor?

THE COURT: Yes.

BY MR. WHEELER:

Q. These exhibits, though, were produced, were they not, just by mechanical means, on an IBM run of your punch cards, were they not, Mr. Tait?

7217 A. They are produced from cards punched from the original bills of lading, or copies of the bills of lading and the freight bills.

Q. And the machine just actually prints this exhibit as it comes out?

A. That is its function, yes.

* * *

7272 MR. WHEELER: Will you mark this, please?

DEPUTY CLERK: No. 15 Defendant, the C & O Exhibit No. 9 for identification.

(Document dated December 9, 1953 entitled "Riss & Company, Inc., Transportation of Explosives for Defense Department" is marked C & O Exhibit No. 9 for identification.)

BY MR. WHEELER:

7273 Q. This is entitled "Riss & Company, Inc., Transportation of Explosives for the Defense Department," and is a brief filed by Riss with the Defense Department, the second paragraph on the first page says "Riss requests that the Department of Defense and the affected services take such action as necessary to assist in securing from the Commission additional temporary authority."

MR. WRIGHT: Have you got the date?

MR. WHEELER: December 9, 1953, and it is signed by N. Alvin Layne, Jr.

THE COURT: What exhibit was that?

DEPUTY CLERK: No. 15 Defendant, the C & O's Exhibit No. 9 for identification.

THE COURT: All right.

BY MR. WHEELER:

Q. I refer you to the paragraph on page 11, Mr. Tait, and ask you to read it, please?

A. "There is also attached an analysis of routing orders, presently tendered to Riss by the Armed Forces which will be directly affected by the order of the Commission, which is now to become effective upon the mandate of the Supreme Court, December 25, 1953. This analysis shows that current routings by the Armed Forces totaling 36,141,160 will be affected by the order of the Commission.

"Riss will be unable to transport these movements in the manner

in which it has performed the service in the past unless additional temporary
7274 authority is secured from the Commission."

BY MR. WHEELER:

Q. Now, I refer you, Mr. Tait, to page 73 of this brief, and ask you to state what that says at the top of the page.

A. Heading on top of the page 73 reads as follows:

"Explosives Traffic Presently Routed by Riss And Company as of 12/8/53 which may be affected by Restriction of Temporary Authority."

Q. Now, I turn to page 75, page 3 of that schedule that you have just read from, and ask you whether that shows as one of the movements that Riss would be unable to handle, as the result of the Commission's action in 60-TA, a movement from Indianhead to Hastings, Nebraska?

A. Page 75-3, I guess it is of the brief, has the heading:

"Shipper, Consignee, Army T/S Number or Navy R/O Number, and Weight."

Under the heading of shipper, it shows Indian Head, Maryland.

7275 Under the heading of consignee, Hastings, Nebraska.

Under the heading of "Army T/S Number" and Navy number NRO not available.

Under the column headed "Weight" there is "one million."

Q. So, that according to Mr. Layne's brief to the Department of Defense, Riss said that in December, 1953, unless the Defense Department took action with the Interstate Commerce Commission to gain Riss additional temporary authority, Riss would be unable to handle a million pounds of ammunition and explosives routed over its--routed by them from Indianhead to Hastings, Nebraska, is that not correct?

THE COURT: Just a minute, now. I want to ask Mr. Layne--

MR. LAYNE: I would like to have Mr. Wheeler--I think Mr. Wheeler inadvertently quoted what I stated to the Department of Defense. I said there would be a million pounds affected in the manner in which Riss

had been transporting it, that is as the originating carrier.

I am sure you want to make that clear to the witness.

THE COURT: Mr. Wheeler.

MR. WHEELER: I accept the amendment.

7276 With that amendment, is that not correct, Mr. Tait?

THE WITNESS: If you are using that, quoting Mr. Layne's brief, yes.

BY MR. WHEELER:

Q. Well, you have no doubt that I was quoting from Mr. Layne's brief, do you?

A. I do not know. You have got a photostatic copy. I do not know.

THE COURT: Well, is there any doubt that this is a copy of your brief?

MR. LAYNE: I have no doubt about that in the world that that is a copy of it.

THE COURT: Mr. Layne has accepted it as a copy.

BY MR. WHEELER:

Q. Now that it has been accepted as copy, your answer is yes, without qualification, is it not?

A. There is no qualification.

* * *

7387 CROSS EXAMINATION OF MR. TAIT BY MR. McGLOTHLIN

Q. Let me ask you first: Who selected what data would be taken off these raw materials and punched into the cards?

A. The selection was made by the Accounting Department, taking all their records of the Government shipments of ammunition and explosives, Class A and Class B, made during the period 1949 through '57.

Q. I have not been clear, Mr. Tait.

Some intelligence had to decide that we will take off the cards such material as the weight of the shipment, the total rate, the total

rate charged, the amount kept, the amount kept by Riss; and we will not take off the card, for example, the specific description of the individual commodities, whether it is a sand loaded rocket or whether it is an anti-personnel mine, but somebody's mind had to make that decision, what you would take off and what you wouldn't take off?

What I am trying to ask you is: Whose mind made that decision?

A. Well, at the outset, that is, I can only tell you that the Government Division handled, in the main, substantially explosives Class A and Class B, and those files were kept separate on the bills of lading, and they went through those files and pulled those bills of lading, and then attached in most cases the freight bill with the bill of lading.

7388 So then they were run from the bill of lading or the freight bill when the card was cut.

Now, that is the extent of the selection, that is, they were pulled out, but the prior selection had been made because that is what the Government Department's function was, was to handle the explosives traffic.

Q. I understand.

* * *

7435 MR. WRIGHT: I may say, Your Honor, if the purpose of this is to show that we were hurt by the Sub. 60 TA Order, we said that on the opening statement. That has never been in issue here.

If that is what all this is about, a great deal of time is being wasted.

* * *

DIRECT EXAMINATION OUT OF PRESENCE OF JURY [illegible] WRIGHT

7524 THE COURT: Well, let me ask you a question: Did you explain to Mr. Riss, I imagine you have, that on cross-examination, if he doesn't put this survey in from Princeton, that he might be cross-examined about this lower figure contained therein?

7525 MR. WRIGHT: Oh, there is no question. We have emphasized to him that we do not believe in ever promising a jury anything that we do not deliver, and we have pointed out to him that in our opening statement we

made explicit and express reference to the report for the management--planning company, and that in our judgment it would be a serious error which might well be very prejudicial to his case, if we did not present that data. So, as far as we are concerned, we will present it if we can.

The fact remains, however, that this is Mr. Riss' business and Mr. Riss' lawsuit, and we left it this way, that if he concluded, he still was of the opinion that at the end of his testimony he thought the introduction of the management-planning study would be prejudicial, we would, of course, defer judgment until then. But as far as I am concerned, no matter what happens on the cross-examination of Mr. Riss, I would urge strongly upon him, myself, that the other report also go into evidence. As I see it, there is no real conflict of any kind between the two reports. You simply have a different group of companies, and different assumptions based on the use of somewhat different data.

Insofar as the theory of damages is concerned, they are, of course, both devoted to precisely the same end, that is, giving the jury data that it needs to make an accurate estimate as to what the difference in value was of Riss & Company as a going business at the time this supplemental complaint was filed, and the difference in value, what the value actually was compared to what it would have been absent the defendants' wrongful conduct.

7526 THE COURT: I think one of the principal things involved in this survey is that apparently Mr. Riss doesn't feel it has taken into consideration that because of the fact that the stock is held by the family, principally held by him, I suppose, that that would make a difference. I think the survey indicated, didn't it, that if the stock were held not by the public, but by one group.

MR. WRIGHT: Yes. The survey, you see, used different material of necessity because it was based on the assumption, how would you value this company if it were publicly held, but actually you will notice the price-earnings ratio that management-planning comes up with is a higher one than Mr. Riss himself uses. As far as the price-earnings ratio, his figure of at least three times is somewhat less than the management-planning ratio of

approximately five times.

Where the real difference, in the result reached, comes is in the assumption that is implicit in the management-planning study that his progress during the whole period would have been no greater than that of the average of the trucking industry.

7527 He says: Look, during '49 through '53, I show that we had a faster growing trucking company than the industry; we were moving ahead more rapidly. That is not a matter of speculation, that is right on the available figures. He says: I think it is unfair to me, that it does not do justice in trying to estimate the injury done to me, to just take this assumption of average growth when I did make a very superior growth during that period.

Now, all of these matters, I don't think that any of these questions go to the admissibility of the evidence, which, as I understand it, is what we are here to discuss. In terms of weight, you always have this problem, and I have seen this worked many times before, and generally, the only safe way to approach it is to put in evidence everything you have.

THE COURT: I am glad you mentioned that. I am firmly of the opinion, and I think the Court has the right to see to it that all the evidence available, whether or not it is low or high, should be put into this case, and I don't care whether Mr. Riss thinks he is going to make up his mind at the end of the trial or not. Mr. Riss is not running this lawsuit or conducting this trial.

7528 I have a duty to this jury, to you, and to all counsel. If evidence is available, it is not for Mr. Riss to decide after he is finished with his cross-examination, well, I will let it go in, but this is evidence that has been promised to the defendants, and they had to spend many, many hours digesting that evidence, and they have prepared, I suppose, to meet it in their own way.

Now, I am inclined, and I might do this: If Mr. Riss says, I am not going to put it in, I may have an idea not to let him put any evidence in the case, and there goes his lawsuit out the window.

MR. WRIGHT: That is right.

THE COURT: Well, I haven't decided that yet, but in view of the fact that counsel has advised his own client that in their opinion the survey should be put in evidence along with Mr. Riss' opinion, the Court has the right to feel also that that is the best advice you could possibly give him. Just because the survey puts the figure a little lower to him than he might put it, does not mean the jury cannot agree with Mr. Riss' testimony.

MR. WRIGHT: That is right, Your Honor, and I wanted to say this: I think it is a little stronger than that. I do think that we have an affirmative duty, and this applies to all counsel and plaintiff, in a case of this kind, for example, on comparability of trucking companies, it is never
7529 possible, of course, to select anybody who is exactly comparable.

The burden is always to come forward with the very best evidence that is available, no matter how disparate the companies involved may be. You have to put forward the best, give the best available evidence, and for my part, I am frank to say, I regard the management-planning survey as certainly at least a part of the best available evidence, notwithstanding the manifest deficiencies that it has from Mr. Riss' standpoint.

But I merely want to say this: So far as the use of data of this kind is concerned, I am very much of the opinion that in terms of order that Mr. Riss' testimony should come first because we are in this position: He is the one who has to be examined, and the only one who can be examined on the peculiar characteristics of Riss & Company, whatever they may be.

THE COURT: I can't say I disagree with you on that.

MR. WRIGHT: Well, I just wanted to make it clear what you run into on this, where you have both kinds of testimony, one, the man who is from the business itself. Now, he is the one, of course, that has to stand cross-examination on what happened to the business, that might
7530 have happened to anybody. The accounting or the valuation

expert never is in a position to be examined about that.

On the other hand, when it comes to theory, of course, it is the valuation expert who stands cross-examination on that. But I do think that in any event it is important to proceed with the testimony and cross-examination of Mr. Riss before we get into the other, so we are not whip-sawed by the valuation expert being cross-examined on a later date when it should have been brought out from Mr. Riss.

THE COURT: I don't think you need to waste any time on that. I have no problem there.

MR. WRIGHT: Well, the only problem is, Your Honor, assurance that the management-planning study with Mr. Meyers' testimony will be offered as part of the plaintiff's case. If I can be given a few moments, we might consult about it.

THE COURT: You might advise Mr. Riss -- he is sitting in the courtroom right now -- that this is one of the most important parts, as he knows, of this case.

Now, I am inclined, frankly, to let Mr. Riss testify, but I think it should be buttressed by this survey.

Let me call your attention to a very interesting article which appeared in the Michigan Law Review, Volume 52, for 1953 and 1954, written by Professor Clark, I think. It has to do with the subject of testimony by
7531 an officer of a corporation.

He is discussing the Story case, the Story Parchment case. He said: The second element of damages in the Story case, the depreciation in the value of the plant, was based on plaintiff's evidence that the plant had cost about $235,000, that it produced parchment of high quality, that the machinery was larger and more efficient than that of the defendants; and that it was worth in June 1928 only $75,000. There was a drop. The latter figure was given as an estimate of value by plaintiff's treasurer and assistant secretary, who had no qualification other than his position for making such a judgment. It seems to me that if a secretary or treasurer,

or assistant secretary, with no qualifications can give that testimony, I see no reason why Mr. Riss cannot testify, provided his opinion is limited to the valuation of the business as of a certain date.

However, Mr. Riss ought to understand that the party that made the survey probably did a much more thorough job in analyzing the profits and losses, and so forth, and growth of these various companies -- I think that there were nine -- than he could do in the limited time we have.

I don't know what these annual reports are going to show before the Commission, but assume that there is a discrepancy between Mr. Riss'
7532 testimony as to the valuation of the company and the survey, the jury may well elect to accept Mr. Riss' testimony, the man who actually knows more about the business than anybody; and you have always got the situation in this case, as you know, that whatever verdict is rendered by a jury, it is mandatory upon the Court to treble that amount of damages, those damages. Now, I don't know whether he is going to get anything, but he knows that. It is a treble damage suit.

After going this far in this case, I would think it would be unwise to try to get this case to the jury, now that they have been told about this survey, and counsel know it, and they are not going to forget about this, and they are going to cross-examine Mr. Riss very thoroughly on the survey. If you don't put it in, I think it might ruin your case. That is just how the Court feels about it.

MR. WRIGHT: That is exactly the way I feel about it, Your Honor.

THE COURT: You might talk to Mr. Riss and find out what he wants to do.

I will take a ten-minute recess.

* * *

DIRECT EXAMINATION OF MR. RISS BY MR. WRIGHT

7564 THE COURT: Let me ask you a question, Mr. Riss. Who owned that common capital stock? Is that 100,000 shares?

THE WITNESS: Yes, sir. My family and Mr. Pick. Mr. Pick owned 10 per cent.

BY MR. WRIGHT:

7565 Q What did you say his ownership was?

A Ten per cent; 10,000 shares.

Q The rest was owned by yourself and your family?

A Yes.

MR. BALL: I think the answer is a little misleading, if the Court please. The entire voting stock of 20,000 shares was owned by Mr. Riss personally.

THE COURT: Is that correct?

THE WITNESS: Yes. This company has Class A and Class B stock of which I own all of the voting stock, 20,000 shares; my children and family own 70 per cent and Mr. Pick owns 10 per cent of the non-voting stock.

* * *

7599 BY MR. WRIGHT:

Q Mr. Riss, do you have an opinion as to what the going value or the value of Riss & Company as a going business was on December 31, 1953?

MR. GATES: Objected to on the grounds that it calls for an answer which is the ultimate issue for the jury to decide, and on the further ground that this witness is not qualified as an evaluation expert.

THE COURT: I will overrule your objection. We have discussed this before. I will overrule your objection.

THE WITNESS: Yes, I have an idea what the value of the business was at the end of 1953.

MR. BALL: I object unless the word "value" is defined more accurately than it is at this point.

THE COURT: You might ask him how he arrives at the value.

BY MR. WRIGHT:

Q. What I want you to understand, Mr. Riss, what I am directing your attention to specifically is the value on that date of Riss & Company as a going business; no other value.

A. Yes, sir, that is what I had in mind.

MR. BALL: And we object to value to whom?

THE COURT: Let's find out what he says, first.

THE WITNESS: In the first place, Mr. Wright, as you know,

7600 there are many ways of figuring the value of a going concern --

MR. GATES: May it please the Court, I dislike very much interrupting, but we have had three terms now; good will, going concern, and going business.

Now, Mr. Wright has said it is his view that "good will" and "goind concern" are the same thing.

Are we now getting a second element in here of "going business?"

THE COURT: Are you giving your opinion about the valuation of the business as a going concern; is that right?

THE WITNESS: Yes, sir, as a going concern.

THE COURT: That takes into consideration, I take it, the good will of the business, your earnings of the business?

THE WITNESS: Yes, sir.

THE COURT: What other factors does it take into consideration?

THE WITNESS: Well, it is the good will and earnings. You talk about the good will of the business; of course that is going with the business, if you were leaving it, if you were to sell a business you would talk about the cost of building up a company that is not on the books at any value, and you think about the earning capacity of the company, in order to arrive
7601 at a value of what it would be worth.

THE COURT: You also estimate the future earnings of the company in arriving at the value?

THE WITNESS: Well, yes, it is. I think in most companies that finance businesses, they figure on the future earnings. They try to anticipate. Of course, no one can guess what a business is going to do in the future. It's almost impossible to tell. But you go along the lines of your chief competitors, and you can pretty well tell about what you should have done in the same period.

MR. BALL: I move to strike the last part of the answer as not responsive to the Court's question, and expressing an opinion and conclusion of the witness on a matter not in issue.

MR. GATES: The question you asked was what he did, what factors he took into account.

THE COURT: Yes.

MR. GATES: He replied by saying what others did, and upon that ground I move to strike.

THE COURT: You leave what others did out, for the time being.

THE WITNESS: I am about to tell you what I think it was worth from its earning capacity only.

THE COURT: All right.

7602 THE WITNESS: By taking the most conservative method that you want to use --

MR. BALL: I move to strike that.

MR. McGLOTHLIN: Yes.

THE COURT: I understand that would be a conclusion, but give us your opinion, based on what you testified.

THE WITNESS: Well, I would say, Your Honor, three times the earning capacity of 1953 would be what the company would be worth as a going concern. Whatever they earned times three would be the value.

THE COURT: What were the earnings that year?

THE WITNESS: About two million six or eight, I forget.

THE COURT: You say three times that would be the fair valuation?

THE WITNESS: That is the most conservative in use anywhere.

MR. BALL: Move to strike out "the most conservative."

THE COURT: You can cross examine him on his knowledge of values.

MR. WHEELER: I didn't hear his last answer.

THE COURT: Three times the net earnings.

That's correct, isn't it?

7603 THE WITNESS: That's the most conservative estimate I have heard.

MR. WHEELER: Your Honor, I didn't understand --

MR. BALL: I move to strike.

THE COURT: I will tell the jury to disregard that.

You have heard his valuation, three times the net earnings.

MR. WHEELER: Is this net earnings before or after taxes, Mr. Riss?

THE WITNESS: Before taxes.

MR. GATES: If it please the Court, that isn't the figure he has been putting up there on the board. I am going to object --

THE COURT: Mr. Gates, you will have ample opportunity to cross examine; now, if you can show any discrepancies, at the

proper time, I will permit you to cross examine.

All right.

BY MR. WRIGHT:

Mr. Riss, do you also have an opinion as to what the value of your company, Riss & Company, was, as a going business, on December 31, 1957?

A. As a going concern in our type of business it was worth nothing.

* * *

7604 Q. What was that?

A. Because you have to keep your operating rights going and if it don't produce a profit no one wants a business that is making a loss.

MR. BALL: Well, now, if the Court please, the witness is now getting away into a matter of market value -- "nobody wants it," and that is --

THE COURT: If you get into that you get into market and utility value --

MR. BALL: Therefore I move to strike the answer because the witness got off into that field.

THE COURT: I will let it stand.

You may proceed.

BY MR. WRIGHT:

Q. Now, Mr. Riss, do you have an opinion as to what the value of Riss & Company as a going business would have been at the end of 1957 had the business been able to keep pace with that of your principal competitors, specifically, the competitors that are listed on the other sheet there, which I don't believe has yet been marked for identification (indicating).

MR. McGLOTHLIN: I object to the question on the first ground, that these people who were originally blanketed into the case by sweeps of Mr. Riss' hands, are now described as his principal competitors, which they obviously on the basis of his testimony were not.

7605 His own figures showed he carried better than 40 per cent explosives in 1953. His own testimony shows that these companies carried little or none.

Now, how you can say that these companies are principal competitors when they are not even in his principal field, escapes me.

MR. WRIGHT: I can solve the problem, I think, by reframing the question.

THE COURT: All right, reframe the question.

MR. McGLOTHLIN: That won't solve all my problems, if I may say so.

THE COURT: I realize both sides have a lot of problems, and the jury and the Court has lots of problems, so let's not make them any more complicated.

All right, let's find out if he can solve the problem.

BY MR. WRIGHT:

Q. I will put the question this way to you, Mr. Riss:

As to whether you have an opinion as to what the value of Riss & Company as a going business would have been at the end of 1957, if it had kept pace with the competitors that are shown on this sheet which has not yet been marked, to wit, Trans-American, Cooper, Jarett, Eastern

7606 Express, General Expressways, Yellow Transit, and Denver-Chicago.

* * *

7647 Q. I will ask the question that I asked before. I will break it into two parts.

You have an opinion, Mr. Riss, first, as to what, if any, net earnings your company would have had the year 1957 if its growth had followed the trend exhibited by the competitors that you named in your testimony last?

THE COURT: Wait a minute. This is all over your objection.

MR. BALL: There is particularly one to this question, if the

Court please.

May I have the question read?

THE COURT: Read the question.

(The question was read by the reporter.)

MR. BALL: We object to that.

7648 MR. GATES: I don't think the reporter has the question down that Mr. Wright asked.

THE COURT: Suppose you read it.

(The question was read by the reporter.)

MR. WRIGHT: Strike out the words "competitors in your testimony last" and just say by Transamerican, Cooper-Jarett, Eastern Express, General Expressways, Yellow Transit, and Denver-Chicago.

MR. BALL: We object to that because the chart on its very face shows there was no trend exhibited by these six companies; that they went every which way. I have, if the Court please, just a graphic representation. It shows a complete lack of any.

THE COURT: I think this is a question for the jury. This is just an opinion. The jury must arrive at what the facts are.

MR. BALL: If the Court please, this problem is how can the jury show what trend when he is trying to lump together six companies.

A. Yes, Mr. Wright. It's hard to estimate exactly what our company would have, how much money they would have made in '57, if we had followed the trend, average trend of those six companies. I am very certain that we would have been making more money than we made in '53, but surely as much as we made in '53.

7649 BY MR. WRIGHT:

Q. Now, based on that opinion as to what your earnings would have been in '53, do you have an opinion as to what the value of Riss & Company as a going business would have been at the end of 1957, assuming that it had earnings?

A. There again, Mr. Wright, if you take the same formula, it would be three for one, it would be around $900.

* * *

CROSS EXAMINATION OF MR. RISS

BY MR. McGLOTHLIN:

* * *

7662 Q. The decline in Government traffic in ammunition explosives that occurred in 1954 of course became apparent to you before December of that year, did it not?

A. It became apparent to us right after the Korean War, of course.

Q. The Korean War ended in '53. I am talking about the decline that occurred in '54. You knew before December of '54 that the volume of ammunition and explosives that you were carrying in '54 was less than it had been in '53; isn't that so?

A. Well, I knew that after the Korean War was over we weren't carrying as many explosives as before the Korean War was over. The Korean War ended in the middle of '53.

Q. I will try again. It is a fact, Mr. Riss, is it not, that you carried less explosives for the United States Government in '54 than you did in '53, isn't that true?

A. Yes; of course.

Q. And you could foresee that that would be the annual result before you got clean to the end of the year, could you not?

A. You mean in '54?

Q. Yes.

7663 A. Yes. I knew that as the Korean War got farther away that there would be less explosives. I anticipated there would be.

Q. I am not talking about anticipation. I am talking about your actual company results, by the end of November 1954, indicated that your total ammunition and explosives traffic in '54 would be less than it had

been in '53; isn't that true?

A. Of course, because the Korean War was on in '53.

* * *

7669 Q. And early in January 1954, an order was entered with the General Motors Company for approximately 500 tractors at a purchase price of something over six million dollars; is that correct?

A. I don't remember the exact date. It was early part of '54, that is correct.

Q. And in the form of the transaction, I don't want to get too complicated, but a company called Rocky Mountain Industries took the title, transferred it to TM&E, and TM&E leased the tractors as they were delivered to Riss & Company; is that correct?

A. Well, no; that is not correct.

Q. Would you correct me?

A. Yes. That company was set up, it was one of our corporations; that was set up with General Motors as a dealer.

Q. That is Rocky Mountain Industries?

A. Yes, sir. As a dealer for General Motors so that they would get the dealer's discount on equipment. And that company sold the equipment to Transport Manufacturing Equipment Company at their cost. Otherwise General Motors could not have sold Transport Manufacturing Equipment Company direct.

Q. And you also owned Rocky Mountain Industries, did you?

A. Yes.

Q. And it is correct that as the tractors were delivered TM&E

7670 leased them to Riss & Company?

A. That is correct.

Q. Now, it is also correct that you personally guaranteed the debt of six million dollars, did you not?

A. Yes, sir.

Q. And it is also correct, I believe you told us, that you in effect

negotiated for both parties on the lease of the tractors from TM&E to Riss & Company?

A. Well, I wouldn't say I negotiated for both parties. I happened to be head of both parties and I put it on a fair basis, what I considered fair; what you say I negotiated for both parties, that is what I did.

* * *

7674 Q. Mr. Riss, I have written up now the amounts that under the lease agreement, as I read them, Riss & Company would pay T. M. & E. in the first year, the second year, and the third year of the purchase, and I believe that the lease should indicate that the amount per tractor is $595.42 per month in the first year, $321.19 per month in the second year, and $178.71 per month in the third year. Is that correct?

A. Yes, sir.

Q. Now I will make a column of what T. M. & E. was paying over to Y. M. A. C.

What was Y. M. A. C., Mr. Riss?

A. Y. M. A. C. is the finance company for General Motors.

Q. It is Yellow Motors Acceptance Corporation; is that it?

A. I don't believe it is Yellow Motors -- Yellow Motors Ac-

7675 ceptance Corporation, I believe is the name of it.

Q. On the payments by T. M. & E. to Y. M. A. C. Mr. Riss, I put up the flat payment per month in each month of the first three years of $237.90.

Is that correct, by the document?

A. I don't see where it is listed at the moment.

Q. I believe it would be in the chattel mortgage.

MR. McGLOTHLIN: May I have your indulgence for a moment, Your Honor?

THE COURT: Yes.

BY MR. McGLOTHLIN:

Q. This actually shows on ten tractors, $2,379.00 per month,

which, per tractor, is $237.90; correct?

A. That looks like it. It is so blurred that you can't tell it but it is 1/60th of the purchase price; I can tell you that, plus interest.

Q. In the third column, Mr. Riss, I am simply going to write the difference between what was paid in each year from Riss & Company to T. M. & E., and the amount which was paid by T. M. & E. on General Motors --

A. Yes, sir.

Q. -- and I will add that up as I go along, to show you the cumulative difference.

The first figure in the right-hand column is the difference, or should be the difference between $2,858.80 paid by T. M. & E. to the
7676 General Motors Company, and the $7,109.04 that Riss & Company paid T. M. & E.

The second figure, you add all that has been paid up to that time by T. M. & E. to General Motors, and subtract it from all that has been paid up to that time from Riss & Company to T. M. & E.

And the same thing with the third figure:

The third figure is the total of the payments in the first three years per tractor, T. M. & E. to Yellow Motors Acceptance Corporation, subtracted from the total amount paid from Riss & Company to T. M. & E. during those three years on each tractor.

Now, the purchase was 500 tractors was it not, Mr. Riss?

A. Yes.

Q. Finally, I want to put down here the cumulative difference on G. M. fleet.

And to arrive at that I will now just take the difference per tractor and multiply it by the 500 tractors which you bought.

These figures, Mr. Riss, I don't mean to indicate should be -- can you see them from there, sir?

A. Yes, sir, fairly.

Q. I will pull them out some.

The figures I show here are something over two million dollars,
7677 and are not intended to be added, of course. They stand alone.

But they would indicate, if my figures are correct -- would they not indicate that at the end of the first year possession of the fleet Riss & Company had paid T. M. & E. over two million dollars more than T. M. & E. had paid into General Motors Acceptance Corporation?

A. Yes. That is a fast write-off. That is the depreciation against the long-time deal.

Q. That is the way it works, is it not?

A. Just for five years, though, not for three.

Q. This would continue to diminish as you got to the fourth and fifth years?

A. And over the five year period it would come out equal.

Q. But the first three years this is the way you come out; is that correct?

A. We charge exactly the rental that the contract calls for, $500.00 a month, dropped on down to $25.00 a month. You have the contract there.

And all the time our payments at General Motors was the same, $2,300.00, or $230.00 a month.

Q. They were on a flat basis, straight through? A. Yes, sir.

Q. And those from Riss & Company to T. M. & E. started out
7678 big and then diminished?

A. That's correct.

* * *

7680 Q. Now, I believe you told us that deliveries under this contract from General Motors to you began in May of 1954, or June of 1954; is that correct?

A. Some time in the middle part of the year. I can't tell you exactly.

Q. You immediately began to find that the tractors were less than

you had hoped for, did you not?

A. That's correct.

Q. What were some of the difficulties you found?

A. Well, one of the main troubles, I think, was that General Motors hadn't been used to delivering direct without going through a dealer. There were a lot of little things wrong, such as some of the bolts needed tightening, and I think one of the greatest difficulties we found was the transmission was not exactly as we had purchased.

Another one of the difficulties were that the motors didn't get the
7681 mileage on the fuel that they told us they would get.

Q. What mileage had you anticipated, Mr. Riss?

A. Five miles to the gallon.

Q. What did your experience show you were getting?

A. 4-58/100ths.

Q. And when the deliveries continued as for May and June, or whenever they started, this difficulty with the gasoline consumption continued, did it not? A. Yes.

Q. You also had difficulty with getting repairs made that you thought should be made, did you not?

A. Oh, I had a little trouble getting General Motors to move as fast as I wanted them to move on them, but they eventually did, and they put them all in shape and made adjustments with me on the difference in fuel.

Q. You recall, Mr. Riss, I showed you a letter when you were last on the stand, from you to Mr. Shantz, which is Pennsylvania Railroad Exhibit for identification 1002, dated October 12, 1954.

I will give you a copy of it (handing).

Q. Yes, sir, I remember this letter.

Q. By that time, in October of '54, you were sufficiently dissatisfied with the trucks to suggest that the final 200 not be delivered; is that correct?

7682 A. I wasn't sufficiently dissatisfied with their making them right,

that I was trying to get them or tell them that I wanted them to take 200 of them back so they would take some action.

Q. That was in October of '54, and when I was last questioning you about this, Mr. Riss, I had marked but had not shown you, I believe, a document which bears a faint date of November 16, 1954, which indicates that it is a letter from you to Mr. Shantz with respect to the same subject, of the trucks, that is.

Would you look at that and tell me whether that is a true copy of a letter you wrote?

MR. McGLOTHLIN: Stamp this one.

THE CLERK: No. 66 defendant, The PRR's Exhibit No. 1027.

(Thereupon chart "Per Tractor" was marked Defendant No. 66 (PRR) Exhibit No. 1027 for identification.)

BY MR. McGLOTHLIN:

Q. You remember that, Mr. Riss? A. Yes.

Q. Mr. Riss, you state in the letter to the representative of General Motors, "The expense on these trucks -- and of course this is without any credit to you - - "has been tremendous."

That was true, was it not?

7683 A. Yes. You see, they had agreed to take care of all the expense on the trucks. I first was not going to accept delivery on the trucks and they told me to take them and they would do whatever was necessary, and I would just advise them as we went along that the expense was mounting, and warning him he was going to have a pretty good-sized bill.

Q. You then also state that:

"It looks like we have spent about $55,000.00 more on the G. M.'s than we should have spent at this time for maintenance."

That's correct, isn't it?

A. I made that remark.

Q. That situation with respect to difficulty with the trucks as they were delivered continued as long as they were being delivered, did it not?

A. Well, I think that we had some of the trucks, they did some work on them before we took delivery -- I think we had some, a little more than usual trouble, or most of them.

Q. When was the delivery of the fleet completed?

A. I just don't remember if they were all delivered in '54 or some of them were delivered in '55.

I believe that we might have signed for them all in '54 but I'm sure that there were some in their lots in the early part of '55. We were
7684 very much in a hurry for them to get them on the road. We needed them.

Q. They were delivered, or deliveries were completed, however, by early 1955, were they not?

A. I'm fairly sure. I just don't remember the dates.

Q. I show you a document, Mr. Riss, dated March 7, 1955, which bears the typed signature "C. A. Tenuta," (spelling), and it is addressed to Mr. R. R. Riss II.

THE CLERK: No. 66 defendant, the PRR Exhibit 1028 for identification.

(Thereupon letter, C. A. Tenuta to R. R. Riss II, 3-7-55, was marked Defendant No. 66 (PRR) Exhibit No. 1028 for identification.)

BY MR. McGLOTHLIN:

Q. Let me ask you first whether you have seen this document before, Mr. Riss?

A. I don't know as I have looked at this particular letter. I have seen letters before mentioning various things wrong with the trucks.

Q. I will show you a document bearing your typed signature, to

"A1," which is dated December 14, 1954, and ask to have it marked for identification.

THE CLERK: No. 66 defendant, PRR's Exhibit No. 1029 for identification.

(Thereupon letter, Riss to "Al" was marked Defendant No. 66 (PRR) Exhibit No. 1029 for identification.)

BY MR. McGLOTHLIN:

Q. Is that your letter, Mr. Riss?

A. Yes, I wrote this letter.

Q. Mr. Riss, in the letter of December 14, 1954, which has been identified as Defendant No. 66, Exhibit No. 1029 for identification, you said:

"So, Al, you can see that this expense is terrific and our fuel mileage is not developing into the five miles per gallon."

That was true, was it not? A. Correct.

Q. Now, your engineers and General Motors' engineers tried various ways to improve the fuel consumption, did they not?

A. We did. We did improve it.

Q. You tried various ways to improve it, first?

A. Well, General Motors, of course, put a man in our shops that would work there with our people to make adjustments and they paid for it, and whatever adjustments were necessary to take care of what we regarded as excessive repair costs.

Q. The difference in the mileage you hoped for and the mileage

7686 that you were getting was a matter of the design of the truck rather than a minor thing to be repaired, was it not?

A. Well, I think there was -- the motor, of course, is what controls the fuel. We were at a later time able to change the stack or the exhaust pipe, and at this date we are now getting a little over five miles a

gallon by having a standing-up exhaust pipe instead of one running straight back.

Q. That's all that had to be done?

A. That's the only change we made to bring up the compression--the difference in the pressure--I don't know whether there's a difference of the pressure, they claim, on the manifolds under the truck, rather than being above the cab.

Q. That change increased the mileage from 4.58 miles per gallon to something over five, didn't it?

A. That is something that we only found out in the last couple of years.

Q. You didn't find that out until about 1958?

A. I don't know exactly what time. It was some time after the settlement I made with General Motors for the refund on the fuel cost and the refund on the excessive profits in 1956. Could have been in 1957.

Q. You mean you got paid and then you found the trouble; is

7687 that it?

A. No, I don't say I got paid -- they were supposed to find the trouble, you know, and one of our mechanics ran into the trouble in St. Louis.

Q. In this letter, 1029 for identification, you also say:

"It seems to me we are spending much too much money on electrical, steering, transmission, body and wheels."

Was that true?

A. That's exactly what I told him.

Q. Well, were you spending too much money on that?

A. For them, yes.

Q. What was the matter with the transmissions?

A. The transmissions, they left one little gear of some kind out that cost $14.00 that caused the trucks to shift. It's a 10-speed, the finest transmission you could buy. It was a 10-speed transmission. Without that

little protection in there, the boy is liable to go into four or five gears at one time and tear them all to pieces, and their excuse for that was that in cutting the trans-

Q. I don't want to know what General Motors told you.

A. All right.

THE COURT: You opened it up. Let him complete the answer.

7688 MR. McGLOTHLIN: Pardon.

THE COURT: Let him complete the answer.

MR. McGLOTHLIN: I object to further answer about what General Motors told him, Your Honor.

THE COURT: All right, the subject has been opened. Let's have the complete answer.

THE WITNESS: Well, when they were confronted with why, they left this little piece out, that cost them thousands of dollars, they said in cutting down the transmission in order to fit the cab, they didn't have any room for it and it cost them thousands of dollars.

THE COURT: All right.

BY MR. McGLOTHLIN:

Q. This document marked PRR's Exhibit for identification 1028 contains a list of components which Mr. Tenuta says required frequent maintenance.

Let me read you this list and you tell me whether these were the components which in your own knowledge were requiring frequent maintenance:

"Power steering brackets?"

A. I heard about them.

Q. I didn't ask you whether you read about them. I asked you whether they did or did not require frequent maintenance?

7689 A. As you know, I didn't repair those trucks myself, and the only thing that I know is the reports that I get from my garage, such as Mr. Tenuta, and Mr. Tenuta was in charge of our maintenance, and if he

wrote letters stating that is what the repairs were, that is the information I received. I wouldn't know about it. That's the only way I would know about it.

Q. Your only information, then, as to these matters, would be what your men told you; is that it?

A. Absolutely.

Q. And that is also true as to this little gear shift that you just told us about?

A. Why, of course. I'm not a mechanic.

Q. Would you then say that these items that Mr. Tenuta lists were the ones which required excessive maintenance?

A. I would say to you that Mr. Tenuta wrote that letter, and I believe he did, and listed those components as the ones giving him the most trouble. That is exactly what the facts were.

Q. This refers to one of the matters as "the electrical circuit transmission."

Do you know what the difficulty was with that?

A. Yes. In the first place, it wasn't supposed to be electrical, they were supposed to have been air.

7690 Electrical was an old type of transmission. We spent more money on the electrical part of the transmission, the records will show, than it cost us to maintain the motors in those trucks.

Q. Another item on this list is the rear axle torque rod. What is the rear axle torque rod?

A. A torque rod is the rod that holds the axle in place so that it don't wobble and turn and tear out your rear end or the gears in the rear end, and the torque rod holds it in place, the bolts on it would crystalize and break and allow the axle to move forward an inch or so on the inside.

Q. What difficulties did you have with that?

A. I just told you, the bolts that held them on crystalized; if my memory serves me correct, that's the biggest difficulty we had.

Q. That allowed the rear axle to shift out of position; is that it?

A. That caused them to get into a position to tear them all to pieces.

Q. Did you have difficulty with power steering?

A. I think they did at first.

Q. Do you recall what that was?

A. Yes, the belts. I am going by memory now. We paid a considerable amount of money extra for power steering because those trucks
7691 are quite heavy, and I believe the belts worked kind of like a fan belt, and the belts were giving some trouble at first, until proper adjustments or grease or something, was put on them. I don't remember exactly what it was that it took to fix them.

* * *

7712 Q. Now, Mr. Riss, I just marked at the end of yesterday's session a document "PRR 1030" a letter which indicates it to be a copy of letter from you to Al Shantz of General Motors, dated March 16, 1955. Would you look at that and tell me whether that is your letter?

A. Yes, I wrote this letter.

Q. You state in this letter, in part, Mr. Riss, "Al, there is something radically wrong with transmissions; we have spent within $4,000 as much on them as we have on motors. Was that true?

A. That is correct.

Q. Now, it was shortly after that, a month or so after that letter was written, that your Director of Maintenance--that you let him go?

A. He got out of the company sometime later.

Q. And that was by invitation?

A. That is right.

Q. What was unsatisfactory about his work?

A. What was unsatisfactory about his work? I just did not feel he was a good manager.

7713 Q. Mr. Riss, I have had marked a letter dated July 25, 1955,

which appears to be a copy of a letter from Mr. Riss, Senior, to Mr. Shantz, Assistant General Manager, GMC Truck and Coach Division.

I ask to have this marked for identification.

DEPUTY CLERK: No. 66, Defendant Pennsylvania Railroad, Exhibit 1031 for identification.

THE COURT: Mark it.

(Defendant PRR Exhibit No. 1031 is marked for identification.)

BY MR. McGLOTHLIN:

Q. Would you look at this, Mr. Riss, and tell me if this is a true copy of your letter?

A. Yes, I wrote this letter.

Q. Mr. Riss, the letter mentions, and I want to ask if this is true as I go along. The first paragraph reads: "Over the past year since we have taken delivery of the fleet of General Motors Trucks, much conversation has been had. Many trips made by yourself and other members of the General Motors Co. to talk over things here in Kansas City, and many of my employees and I have been--" that was true, you had conferences in both places.

A. What was the date?

Q. July 25, 1955.

A. I said over a year ago we had taken delivery of the trucks.

7714 Q. It says, "over the past year since we have taken delivery of the fleet."

A. That means I must have had them before July of 1954.

Q. That is what this would indicate. Is that your recollection?

A. That would indicate that we had had them a year by July of 1955. But I do not know. I told you that.

Q. Whereas the other one indicated you had three hundred in October?

A. That letter indicated that we had three hundred in use. There could have been 200 in the shops.

THE COURT: So the jury will understand to whom the letter was--give the addressee. This is "Dear Al." Now that means--how do you spell that?

THE WITNESS: S-h-a-n-t-z.

THE COURT: Is that in the record already, he is assistant general sales manager, GMAC, at Pontiac, Michigan, you were writing to him.

THE WITNESS: He was a man assigned to the sale of equipment to the government and to Riss and Company. That was his only duty with General Motors.

THE COURT: All right.

7715 BY MR. McGLOTHLIN:

Q. Your next paragraph says as of July 25, 1955--and I now quote--"Up to the present time nothing has been done."

That was true, was it not?

A. No, sir. I meant nothing had been completed. I did say nothing has been done, because he knew better than that because they had men in our shop who had spent many dollars and we had spent many dollars.

I meant the jobs had not been completed.

Q. When you say nothing has been done, you mean it had not been completed, is that it?

A. When I said nothing was done, you would not say that to a man who knew better. Sure, they did some things the first day we took the trucks, and for many days on. But they had not completed what we had agreed they would do to modify those trucks.

Q. The next sentence says "The situation is at a point now where some action must be taken immediately or I will be forced to start delivering trucks back to you at whatever locations you would like to have them."

Is that true?

A. That was exactly true. Correct.

Q. Paragraph continues, the next paragraph reads:

"We have spent almost two million dollars on fuel on the basis
7716 of around four and a half miles per gallon. Although it was agreed that your trucks would get between five and six miles. We were assured a minimum of five miles."

That was true?

A. That is correct.

Q. (Reading) "This would mean we have spent over $200,000 more than we should have spent for fuel had we gotten five miles per gallon, and several hundred thousand more than had we bought Cummings which would have gotten six miles."

A. That was a little sales talk I was using on them, trying to say Cummings was better than his trucks; it was true we were spending that much money for repairs and we thought it was excessive.

It is also true we spent that much more for fuel, and in 1956 they gave me back a million and a half dollars.

Q. To take things one step at a time, I will get to all of the money.

This is true that you have spent by July 25, 1955, over $200,000 more than you should have spent for fuel?

A. That was a remark I made. I am not sure those figures were correct. I was talking, I did not think I said right to the penny.
7717 I think I said approximately so and so. I do not think we said that we had the figures, we had it figured out, spent $200,008.10. I think I said around $200,000, did I not?

Q. You said "this would mean we have spent over $200,000 more."

A. Over, under, or approximately--that is approximately the same.

Q. I see.

I will put, in order not to overstate it, I will put "$200,000,"

for fuel.

I suppose that should be "excess fuel," should it not?

A. Yes, that is what I was trying to infer.

Q. You next say "We have spent over $200,000 for preventive maintenance in accordance with your manual, and for many conversations I have had with your man here, Mr. Hensch, our boys have been doing an excellent job on preventative maintenance," so it cost you $200,000 for preventive maintenance.

A. That was ordinary expense. I was calling to his attention that according to his own people who were supervising my people, that our boys had been doing an excellent job on preventive means. I did not want him to think the excess in repairs were the cause of us not taking care of

7718 the trucks.

Q. Well, my question was: "It was true that you had spent over $200,000 on preventive maintenance."

That is true.

A. If that is what the letter said, that is probably correct.

Q. I will put this "Preventive maintenance, $200,000."

A. That would work out to about one-third of a cent a mile.

Q. Your next paragraph reads:

"We have spent more than $420,000 on running maintenance, which, in my opinion, is far in excess of what it should have been on trucks which cost as much as these."

It was true, was it not, that you had spent more than $420,000 on running maintenance by that time.

A. Yes, sir, more than I thought was necessary.

Q. The next paragraph reads "I told you from the very beginning I thought these trucks were badly engineered and I think surely by this time you must agree with me."

You thought from the beginning they were badly engineered.

A. I did not think they were badly engineered. I thought they

were badly constructed. If they had been built like they were engineered,
7719 they would have been all right.

Q. When you say "I thought these trucks were badly engineered," you meant you thought they were well engineered but badly constructed, is that it?

A. That is correct.

Q. The next paragraph reads "I can not continue to take these losses." Was that true?

A. That is absolutely true.

Q. Your next paragraph reads, "Now, I understand transmissions are in such shape that somewhere between $150,000 and $200,000 will have to be spent on them, and even then they will not be right. These transmissions were put out without filters, probably the only fleet in America with no filters."

Was it true that the transmissions were in such shape that between $150,000 and a quarter of a million dollars would have to be spent on them?

A. That is what I said in the letter.

Q. Was it true?

A. I think it was or I would not have written it.

Q. You also believe that even after that they would not be right?

A. That is what I said to Mr. Shantz, as according to how they were fixed and I did not think they would be like we bought, that is correct.
7720 Q. Well, was it true that even then it would not be right?

A. Yes, sir, I said so right in the letter.

Q. I will put it there, the lower figure in order not to get in any arguments about what is between $150,000 and $200,000.

Now, you next say "We have spent $42,000 for body repair other than wrecks. In my opinion, we should have spent nothing."

It was true you had spent $42,000 for body repairs, is it not?

A. If that is in my letter, that is what the figures were at that time.

Q. It was your judgment that you should have had to spend nothing?

A. That is correct, new trucks, that is correct.

Q. Mr. Riss, in the years 1952 and 1953, when you were operating principally with owner-operator equipment, it was the obligation of the owner of the equipment to do the maintenance, was it not?

A. Yes, sir, on trucks they own, of course.

Q. The final paragraph reads, Mr. Riss:

"I sincerely hope that you will believe me to be serious in this letter and that you will take whatever action is necessary
7721 and go as far as you have to go with the officers of your company to get some immediate action, because, if it is not forthcoming immediately, we will start delivering trucks to General Motors over our territory and discuss a settlement with you at a later date."

Now, you seriously meant that?

A. I believe I did, they evidently believed I meant it because they took some action right after that.

Q. My question was not what they believed. My question was: You seriously meant that threat, did you not?

A. I certainly did.

Q. Now, that was in July and I say they took action in, that was July of 1955. What action did they take immediately afterwards?

A. Oh, I think they sent some men around to all of our shops, furnished the men, and they did some work on the trucks. They did not actually complete them, I believe, until sometime in 1956. But they did take some action of fixing certain things to the trucks, and it was sometime during 1955 and the early part of 1956, that they completed the job and I made a settlement with them sometime in 1956--

Q. I will come to that, Mr. Riss.

7722 You said they took action immediately afterwards?

A. I am trying to refer to time. I cannot remember the exact date.

Q. You cannot recall then what they did immediately afterwards?

A. No, I do not know if they were working on fan belts or on the tanks.

I do not know.

Q. You do recall that they started work on some new components or new parts immediately afterwards?

A. I believe they did about the time that they really took more action then than they had in the past. I will say that.

Q. Mr. Riss, I was under the impression that from the outset from the time delivery started, that General Motors had had people cooperating in your garages and working on maintenance, isn't that true?

A. They furnished a man who supervised, who supervised our superintendent and taught him about the trucks, and our mechanics.

Then when they got ready to fix them, the components, or overhaul some of them, they sent mechanics around and worked in our shops.

Q. What happened immediately after this threat? Was it an in-
7723 tensification of that cooperation, you might say?

A. Yes, sir.

Q. You continued to complain, however, about the trucks, did you not?

A. I think I did, yes.

Q. Do you recall any further meetings with the General Motors people about the trucks?

A. Oh, yes, we had them, sent many letters and wires.

Q. Do you recall the meetings with them?

A. I cannot recall back just what meeting. I remember I had a meeting with the vice president in charge of truck manufacture, and with the gentleman who used to be assistant in defense; when I made the final settlement with them I met with them in New York.

There were several meetings, and my boys met at several meetings with their mechanics and engineers.

Q. I just wanted to know about yours.

A. I cannot recall. If you have some others there, I will tell you if I can.

Q. Let me ask you whether you recall any conversations in October of 1955 with respect to the matters that still needed to be done about the trucks?

A. I probably did, if they had not been--

Q. Just answer me - do you recall any such date?

A. I can not recall any specific date. I cannot recall any specific

7724 date of any meetings I had then.

Q. Apart from the date, do you recall whether or not in the fall of 1955, there was an agreement between you and the General Motors people that some forty modifications or changes in the trucks would be made at your request?

A. I recall, that was not, my man went up and worked with their engineers and that is what they agreed upon, that it would be necessary, and yes, they agreed to make those repairs.

Q. Was there any--do you recall whether any time was agreed as to when those modifications would be completed?

A. They were going to do it immediately, so they said, and to the best of my memory they did not do it quite as fast as I thought they should.

Q. My question was, do you recall whether there was an agreement as to the time when that work would be completed?

A. I think so. I think they said they would immediately get on them, and it did not take so long. I just cannot remember the figures.

MR. McGLOTHLIN: I wish to mark a letter which indicates this is a copy from you, Mr. Riss, to Mr. P. J. Monaghan, the general manager, GMC Truck and Coach Division, General Motors Corporation, Pontiac, Michigan.

The letter is dated February 29, 1956, and indicates a carbon

7725 copy to Mr. A. E. Kallen, K-a-l-l-e-n, President, Yellow Manufacturing Acceptance Corporation, General Motors Building, Detroit, Michigan.

I ask that this be marked for identification.

DEPUTY CLERK: No. 66 Defendants PRR No. 1032 for identification.

(Letter dated 2-29-56 from Mr. Riss to Mr. Monaghan, GMC, Pontiac, Michigan is marked for identification Defendants No. 1032.)

BY MR. McGLOTHLIN:

Q. Will you tell me whether this is a copy of a letter you wrote, Mr. Riss?

A. Yes, I wrote this letter.

Q. Thank you.

Mr. Riss, this letter is dated the last day of February, 1956.

A. Yes, sir.

Q. The first sentence reads "We are greatly disappointed that the modifications to our four hundred ninety-three GMC units have not been complete."

That referred to the tractors you had bought from General Motors, did it not?

A. That is correct.

Q. Does this refresh your recollection that, as of the end of February the modifications had not been completed?

7726 A. That is right, and some of the work they had done before we did not think was satisfactory.

Q. It further says in the following sentence:

"You will recall that in October we agreed that some forty modifications were necessary to maintain this equipment in proper operating condition."

Does that refresh your recollection to just such an agreement?

A. Yes, there was an agreement drawn up with Mr. Van Buren and the engineers agreed upon some forty modifications and they were supposed to have gotten on that immediately and they had not as fast as I thought they should have.

Q. It was true that the forty modifications were necessary to maintain the equipment in proper operating condition?

A. Well, it was true that it was necessary to modify those forty things on the trucks in order to have a truck that I thought I had bought, yes.

Q. Well, I am just trying to check your statement here, Mr. Riss. You wrote to the manager of GMC Truck and Coach Division:

"We agreed that some 40 modifications were necessary to maintain this equipment in proper operating condition."

7727 Now, that was true, was it not?

A. Correct.

Q. The next sentence reads:

"This work was to have been completed by December 31, 1955."

Does that refresh your recollection as to the period in which it was to be done?

A. That was probably the date that was agreed upon in the October meeting, that they would try to have it done by the end of the year.

Q. The next says:

"As of this writing", at the end of February, 1956--

"fifteen of these modifications have not been completed or even commenced."

That was true, was it not?

A. It must have been if I wrote it in February.

Q. The next paragraph commences, Mr. Riss, "In addition to these items, Phil, you will recall that our power steering mechanism failed

a number of times, and in fact required two campaigns by personnel from your organization"--the word "Phil" is a reference to Mr. Monagaghan, is it not? A. Yes.

Q. "Power steering mechanism failed a number of times."

7728 That was true, was it not?

A. Yes, it was true.

Q. Did any of those failures occur while the truck was in motion?

A. I believe, I do not think there was any serious accident--

Q. I was not suggesting any accident. All I wanted to know, did any of the failures occur while the trucks were in motion?

A. I was trying to tell you from my memory one of them failed and a boy ran off in a field. That is the only one I recall.

Q. You refer here "The steering mechanism required two campaigns by personnel from GM."

Was a campaign--

A. Well, that is probably, I just did not phrase it properly, probably--I meant they were trying to fix them on two different times. That is probably a little political talk there and I could have used other English.

Q. I am not criticizing your English. A. Yes.

Q. I thought the word "campaign," since you use it here, is when something is found wrong with the entire group, whether it be trucks or air planes, and the manufacturer makes a modification of the whole group.

7729 Isn't that what a campaign means?

A. That is your way of analyzing it. Probably I had something else in mind when I wrote that. I use expressions not found in the dictionary at times.

Q. Would you tell us what you did mean, then?

A. I meant twice they had gone into the power steering, and on the first time and the second time they failed to cure the evils.

Q. The next sentence reads--and this time you use it as a verb, and I will ask you about it again--the fuel tank braces were campaigned once,

and that proved to be entirely unsatisfactory and requires another modification."

I take it from that, braces had been modified once and were still not satisfactory, is that correct?

A. To the best of my memory, the bands around the tanks were very light. Some of the tanks fell off of the trucks while they were in operation. They put some other bands on that, still were not strong enough and that is what I was referring to.

Q. You next state "The oil seals on the rear axle were replaced by a different type which now seems to be fixing it satisfactorily."

7730 Then you continue--

A. I am surprised I said anything nice about them.

Q. I beg your pardon.

A. I am surprised I said anything nice about them.

Q. I am just leading up to the next sentence, which reads, "However, due to these campaigns, we have lost countless hours of service from these vehicles, and moreover, the items which failed and necessitated these modifications caused Riss and Company hundreds of thousands of dollars in breakdown time, snow time (because of poor traction) and other compensation which was paid to driving personnel."

Now, it was true that the repair programs had caused you to lose large numbers of hours of service from the General Motors Trucks?

A. And General Motors being the type of firm they are, paid a million and a half dollars.

Q. Just answer my question.

THE COURT: You will get a chance later to say that.

THE WITNESS: Yes, that is true.

BY MR. McGLOTHLIN:

Q. You also say:

"The items which failed and necessitated these modifications cost Riss and Company hundreds of thousands of

7731 dollars in breakdown time."

Now, what do you mean by costing you hundreds of thousands of dollars in breakdown time?

A. Well, when I got into the hundreds of thousands, I was probably looking at some figures somewhere.

Q. I understand.

A. We did have breakdown time, and with our union contract if a truck breaks down on the highway you pay the boys or drivers the rate, plus the mechanic to fix the truck. That is what I was referring to.

Q. This is additional compensation paid to your drivers when the truck was not operating?

A. If the truck broke down while en route somewhere.

Q. You then refer to snow-time because of poor traction. What does that mean?

A. That means the trucks were engineered and they only put 45 per cent of the weight on one axle and 55 on the other axle. It should have been 65-35 so the driving axles are or have more weight on them, and when it would snow a little bit, your wheels would spin instead of going up the hill.

If they had more weight on the drive axle, they would have done that.

Q. Let me see if I can understand it--

A. That is not a tandem tractor. You would not understand it.

7732 Q. Let me try it. The model of your tractor which you have here on counsel's table shows a tractor with a single axle at the front and a single axle at the back.

A. No, sir.

Q. General Motors Trucks, however, had a single axle in front and double axles in back.

A. If you really want to know, bring me the trailer and I will show you how the tractor works.

Q. Answer my question.

A. Yes, they had two axles in the rear, tandem axles.

Q. And the two axles in the rear on the General Motors Trucks, one had power applied to it and one did not, is that correct?

A. That is right. Known as a dead axle.

Q. Which one had the power?

A. The rear one.

Q. The rear of the two at the rear of the truck?

A. Yes, sir.

Q. And your problem was that not sufficient weight was engineered to rest upon the driving wheels, is that it?

A. That is correct.

7733 Q. And because there was not sufficient weight put on those in the time of slippery conditions on the highway the trucks lost traction?

A. That is right.

Q. And were, therefore, not able to operate, is that correct?

A. I did not say they were not able to operate. We just thought they did not go over the hills the way we wanted them to go over for a truck of that cost.

Q. When you referred in your letter to Mr. Monaghan to snowtime, you were referring to the times the trucks had to stop?

A. That is true, used by the unions, snowtime means where the conditions cause you to have to stop operating.

Q. I thought I understood you to say just now, that was poor engineering rather than poor construction?

A. That was one of the things that was poor engineering.

There was a little bit of both mixed in.

A. I see.

In the next paragraph, Mr. Riss, you discuss the continuing problem of the fuel economy, and you end by saying in that paragraph:

"The difference between what we are experiencing and the actual 5 miles per gallon has actually cost Riss and Company several hundreds of thousands of dollars."

7733-A That was true, was it not?

A. Yes, I am sure it was true. I cannot remember how many hundred thousand. I do not recall. They gave me $450,000 refund on the fuel.

Q. I move to strike that, your Honor.

THE COURT: I will let the answer stay.

MR. McGLOTHLIN: This witness is being allowed to spout his theories--

THE COURT: Well, now, you are spouting your theory. Let him spout his theory in answering. All right, let us proceed.

MR. McGLOTHLIN: I object to your Honor's comment.

THE COURT: Overruled.

BY MR. McGLOTHLIN:

Q. In the preceding paragraph where you refer to breakdown time and snowtime, you refer to the fact that that cost Riss hundreds of thousands of dollars.

Do you have any estimate now as to how many hundreds of thousands of dollars?

A. Yes, I think that I presented General Motors with a bill for about a million eight hundred thousand dollars and naturally we put in everything that we thought should be in there, and I settled with them for

7733-B a million and a half dollars.

Q. Well, your recollection then as to breakdown and snowtime was around a million eight, is that correct?

A. No, sir, all excessive repairs, and breakdown time, and so forth. All of the claim that I had against General Motors for any reason, I settled with them for a million and a half dollars. They were

very, very honorable, and I kept writing them about these things and warning them all of the time. That is the reason for all of those letters.

Q. Now, would you come back and tell me what you meant in your letter when you said hundreds of thousands of dollars in breakdown and snowtime?

How many hundreds?

A. A million eight hundred thousand is $1,800,000, if I remember correctly. I settled for $1500 thousand, so I would say hundreds of thousands is correct.

Q. $1800 thousand represented only breakdown and snowtime?

A. No, sir, I said for all the claim. I do not have--there is a list somewhere of what we presented to General Motors. I cannot tell you. It was around $444,000 if my memory serves me correctly, what we collected on fuel.

7733-C But what we collect on each and every item I can not tell you. The total was $1,500,000.

Q. You have no recollection now of how many hundreds of thousands of dollars you meant in this letter which has been marked 1032, dated February 29, 1956, is that correct?

A. Well, I would say, after hearing that letter, I was talking as much for my side as I possibly could. General Motors thought they owed me a million and a half dollars and I settled for that.

MR. McGLOTHLIN: Would you read the question back?

(The reporter read the question.)

THE WITNESS: I do not think I had any figure in my mind. I just knew there had been a lot of excessive expense and I was pretty well right when we got down to the honest figures, to the true figures.

BY MR. McGLOTHLIN:

Q. You do not recall, is that it?

A. That is right, I do not.

Q. I will see if I can ask you a question which does not give

you the opportunity to say a million-five.

The last paragraph reads "We must also advise that unless the other modifications as agreed upon and contained in the minutes of the meeting of October 5, 1955, and reconfirmed in Mr. Pettigrew's letter are com-
7733-D pleted by May 1, 1956, without causing unreasonable out-of-service delay, we will cease to make payments on these units to the Yellow Manufacturing Acceptance Corporation?

A. That is correct.

Q. Did you cease to make such payments?

A. Yes, I did, yes, I did. Yes, I did.

Q. When?

A. I think some where along--I am just guessing at this.

Q. I do not want any guess.

MR. McGLOTHLIN: I ask to have marked for identification a letter from, it appears to be a copy of a letter, to Mr. H. E. Pettigrew, Director of Maintenance, to the G. M. Truck and Coach Division, General Motors Corporation, Pontiac, Michigan, directed to the Attention of Mr. A. A. Shantz.

It is dated August 14, 1956. I ask to have it marked for identification.

DEPUTY CLERK: No. 66 Defendant PRR Exhibit 1033 for identification.

(Defendant PRR Exhibit 1033
Letter dated 8-14-56 is marked
for identification.)

7734 BY MR. McGLOTHLIN:

Q. Did you see a copy of this letter, Mr. Riss?

A. I see a copy was sent to me. I do not know if I remember this thing. Is this the letter he wrote to the General Motors expressing his views--

Q. My inquiry is only whether you saw a copy of it?

A. I do not recall ever seeing this letter. But I see there is a copy of it to me.

Q. Thank you.

In this letter, Mr. Pettigrew states on the second page:

"For the past two years this concern has had similar difficulties to contend with that were inherent in the five hundred road tractors purchased from you."

It was true that you had had similar difficulties for the two years preceding August, 1956--

A. Similar to what? I do not know what he said before that. What do you mean "similar--

THE COURT: Suppose you let him look at this copy.

He can look at this copy, and you can use yours, Mr. McGlothlin.

MR. McGLOTHLIN: Thank you, your Honor.

THE COURT: What part of the letter are you referring to, Mr.

7735 McGlothlin?

MR. McGLOTHLIN: I am referring to the lower part of the page 2. There is a reference, which I just read, that Riss and Company had experienced similar difficulties with the road tractors--which are the ones we are talking about here--this particular letter is not concerned with the road tractors, themselves.

But that is referring to other vehicles.

THE COURT: All right.

THE WITNESS: I know this letter is not referring to other vehicles. This letter is referring to nothing but the vehicles, the five hundred vehicles purchased from General Motors. It could be referring maybe to a few little pickup delivery trucks. I do not recall anything seriously wrong with those. But he would have no reason to be talking to Mr. Shantz about any other piece of equipment at all except the General Motors.

BY MR. McGLOTHLIN:

Q. Would you read the first paragraph of the letter? A. Yes.

Q. Doesn't it say, Mr. Riss, "the writer was in Pontiac last Tuesday and Wednesday for the purpose of making inspection of the pilot model of the F-600 TL Tractor."

A. Well, you see--

Q. "The results of my inspection were most disappointing from
7736 many standpoint."

The F-600 TL tractor is not the one you purchased in 1954, is it?

A. As I stated to you, we bought a few City jobs that are now used on the highway. That is exactly what he is referring to.

Q. I thought you said it referred only to the earlier tractors.

A. I said unless it referred to a few city jobs that we had purchased. But I had heard of nothing seriously wrong with those.

Q. My earlier question, Mr. Riss, was: Was Mr. Pettigrew correct in saying that "this concern, for the past two years, this concern has had similar difficulties to contend with that were inherent in the 500 road tractors purchased from you."?

A. Yes, I will tell you exactly what he was saying.

Q. All right.

I just want to know whether that is true, Mr. Riss.

A. That is true.

Q. Now, the next paragraph reads:

"Our experience, due to the deficiencies of the 500 road tractors, has been unbearably expensive from the standpoint of loss of utilization of the vehicles, drivers' wages, interruptions to the customer
7737 service, telephone expense, deterioration of perishable loads, and loss of customers."

Is it true that your experience, due to the deficiencies of the 500 road tractors, had been unbearably expensive?

A. I would say that gentleman is a very good salesman. That

is true that we claimed those various things.

Q. Was it true, that is what I want to know.

A. I am sure that we were talking about the additional expense that we thought we were going to have on this equipment when we purchased it. That is absolutely true, yes.

* * *

MR. McGLOTHLIN: I ask to have marked for identification a letter signed by Mr. Riss, a copy, what purports to be a copy of a letter signed by Mr. Riss as president of T. M. & E., dated October 9, 1956, addressed to Mr. A. E. Kallen, President of the Yellow Manufacturing Acceptance
7738 Corporation at Detroit.

DEPUTY CLERK: Defendant 66 PRR's exhibit 1034 for identification.

(Letter signed by Mr. Riss, dated 10-9-56 to Yellow Mfg. Acceptance Corporation is marked Defendant Exhibit 1034 for identification.)

BY MR. McGLOTHLIN:

Q. Is this a copy of a letter you wrote, Mr. Riss?

A. Yes.

Q. That is a letter you wrote? A. Yes.

Q. Thank you.

The letter reads in its first line, Mr. Riss, "Per my verbal proposal to Mr. Monaghan, we are enclosing our equipment payment check for two-fifths--40 per cent of our General Motors Fleet."

Now, Mr. Monaghan was the manager for the Manufacturing Division of General Motors which had made the trucks?

A. I believe he was vice president in charge of the Truck Division.

Q. And this letter is sent to the President of the company which had financed the trucks, to whom you made payments?

A. It is all owned by General Motors. They were one company.

7739 THE COURT: Excuse me. Turn that microphone a little bit, Mr. Riss.

THE WITNESS: Yes.

THE COURT: Thank you.

BY MR. McGLOTHLIN:

Q. Mr. Kallen was President of the Financing Corporation?

A. Yes.

Q. Now, you refer here to your verbal proposal to Mr. Monaghan. This letter is dated October 9, 1956. Do you recall how much earlier you had made some sort of verbal proposal to Mr. Monaghan?

A. I think it had been just a short time before.

Q. A few weeks?

A. A week, maybe. I cannot recall now.

Q. Do you recall the proposal, what it was?

A. Yes. I told him if he would take back 300 of those trucks on just what we owed for them, I would let him have them back, in view of the fact we had not paid anything down on the trucks I thought what we had paid in on them was the rental. They said--

Q. So the proposal was that you would turn back three hundred of the trucks to him and retain two hundred?

A. That is correct.

Q. It was just about this time that you decided to start using

7740 piggyback, was it not? A. Correct.

Q. In fact, it was about this time that you started to go, I believe, 100 per cent piggy-back in the East, is that not true?

A. We never went 100 per cent, but very much of this was piggy-back and Chicago and St. Louis-east, yes.

Q. In the area from St. Louis east to New York and Philadelphia, starting about October of 1956, or thereabouts, a considerable amount of

your business was done by placing trailers on flat cars, rather than pulling them by truck tractors, is that correct? A. Yes.

Q. And that reduced your need for the tractors, did it not?

A. Well, yes. We would not need so many tractors, that is true.

Q. The next paragraph starts:

"My discussion with Mr. Monaghan was based on the presumption we would immediately return 300 units to General Motors. You can appreciate that our new operation a radical departure from the old one, and we will not know for several
7741 days whether we will be using two hundred or more of the General Motors Tractors. However, pending determination of this, we are reinstituting payments for two hundred units."

The statement here, Mr. Riss "you can appreciate that our new operation is a radical departure from the old one." To what did that refer?

A. That meant we were using piggyback instead of trucks to pull our trailers.

Q. That would have been a considerable change from the way you had been operating?

A. Yes, it would, going on flat cars instead of over-the-road. The eastern part of our operation.

* * *

7783 Q. Mr. Riss, there came a time, did there not, when you decided to expand your operation in the transportation of refrigerated merchandise?

A. Well, at the time that the cut came in the explosives business, we lost all of the explosives business, we were trying to substitute refrigerated business for that business, yes.

Q. And in that connection you purchased some trailers with refrigeration equipment, didn't you?

A. We always had -- we had always been known as a big refrigerating company, but we purchased more of a different type, yes.

7784 Q. You expanded your fleet of refrigerating trailers, did you?

A. No, not from '54 on, we never had more than we had purchased in '54.

Q. How many did you purchase in '54?

A. I believe it was 400.

Q. And it is your testimony that you didn't increase over 400 on refrigerator trailers?

A. No, we never did -- we had intended to, in our purchase of '57, to have 650, but I don't believe we have ever had over 400 refrigerated trailers. It might be 400 and a few, but I am talking about any sizable amount.

* * *

7793 Q. The amount of the rental that Riss & Company was to pay TM&E was to be enough to enable TM&E to meet the payments to Fruehauf?

A. The amount Riss & Company paid TM&E formerly was the cost of the trailer plus $10 a month for bookkeeping.

Q. In the case of these trailers did you have the accelerated writeoff that you had with the General Motors Tractors?

A. Yes, sir.

Q. So that again the payments from Riss & Company to TM&E with the first one, two or three years, were higher than the amounts that TM&E had to pay over, is that correct?

A. Let me explain to you.

Q. Yes.

A. We took the fast write-off, which meant we charged double the first year, less the next year, and over the six-year period it came

7794 out the same.

That was the law passed in 1954 that allowed any purchase of new equipment to be charged off with a fast writeoff.

Q. I am not suggesting in any way it was illegal. A. Yes.

Q. I wanted to understand what it was. I did some figures with respect to the General Motors fast write-off and how that worked. What I am asking was the arrangement fairly similar?

A. With the exception that on trailers it was six years, and that on tractors it was four years.

* * *

BY MR. McGLOTHLIN

* * *

7824 Q. Mr. Riss, early in 1957, you contracted to buy 650 more trailers, 650 new trailers from Fruehauf; did you not?

A. I believe the order was for 850. I think the first order read 650; then later, 200 added.

MR. McGLOTHLIN: I would like to have marked for identification--

MR. WRIGHT: I think it would help, when Mr. McGlothlin is referring to these corporations, if instead of saying, "you," he would indicate the particular corporation that he is talking about.

MR. McGLOTHLIN: I will try to do that, Your Honor.

THE COURT: All right.

MR. McGLOTHLIN: I thought that it became apparent from the document, but I am perfectly willing to try it.

7825 I would like to have marked first a Memorandum of Agreement between Fruehauf Trailer Company and Transport Manufacturing and Equipment Company.

This copy didn't print, but I believe it is correct -- if not, I will change it -- that the date on the blanks should be dated, "this 16th day of January, 1957."

THE CLERK: No. 66 Defendant PRR's Exhibit No. 1052, for identification.

(Whereupon copy of Memorandum of Agreement between Fruehauf Trailer Company and Transport Manufacturing and Equipment Company, dated, January 16, 1957, was marked No. 66 Defendant PRR's Exhibit No. 1052, for identification.)

MR. McGLOTHLIN: I would like to have marked as the next number a Memorandum of Agreement, also dated the 16th of January, 1957, also between Fruehauf Trailer Company and Transport Manufacturing and Equipment Company.

THE CLERK: No. 66 Defendant, the PRR's Exhibit No. 1053, for identification.

(Whereupon copy of another Memorandum of Agreement between Fruehauf Trailer Company and Transport Manufacturing and Equipment Company, dated January 16, 1957, was marked No. 66 Defendant PRR's Exhibit No. 1053, for identification.)

7826 MR. McGLOTHLIN: And finally, I would like to have marked with the next number a Memorandum of Agreement, dated the 16th day of July, 1957, between Fruehauf and T. M. &E.

THE CLERK: No. 66 Defendant, the PRR's Exhibit No. 1054, for identification.

(Whereupon copy of Memorandum of Agreement between Fruehauf Trailer Company and Transport Manufacturing and Equipment Company, dated July 16, 1957, was marked No. 66 Defendant, the PRR's Exhibit No. 1054, for identification.)

BY MR. McGLOTHLIN:

Q. Mr. Riss, those are agreements between Transport Manufacturing

and Equipment Company and Fruehauf with respect to the purchase of new trailers in 1957, and the turning in of some of your older trailers; are they not? A. Yes.

Mr. McGlothlin, let me explain to you, if you please.

It is awfully easy for me to say, "I," or "we," referring to both companies or one company. My answers to you in regard to all these is in behalf of T.M.& E. and Fruehauf. There was no deal between Riss & Company and Fruehauf.

7827 The only thing Riss & Company had to do with it is they were co-signers of the note. But the obligations, and so forth, to Fruehauf, were all from T. M. & E.

Q. I understand that, Mr. Riss. It is true, however, that the lawsuit in Kansas City has both T. M. & E. and Riss & Company as defendants; is that correct?

A. Yes, because Fruehauf sued us both, because Riss & Company were co-signers on the note with T. M. & E.

Q. And both Riss & Company and T. M. & E. are the counterclaimants?

A. Yes, had to be.

Q. Referring to Exhibit 1052, for identification, Mr. Riss, that indicates an agreement by T. M. & E. to buy 400 new vans at a total price of $1,452,000; does it not?

A. There were 400 vans. I don't see the price here.

Q. And 250 new refrigerated trailers; is that correct?

A. Yes, those are reefers.

Q. Yes. Now, at the same time, Fruehauf was going to buy back from T. M. & E., in accordance with Document 1053, for identification, 600 used trailers; was it not?

7828 A. Well, plus some others, some gasoline tank trucks, and so forth. There were seven pieces of equipment to be purchased.

Q. Were you in the gasoline tank business at that time?

A. No, but we had gasoline tanks to run in our yards, and we serviced our tractors out of the tanks; and had a motor on them, and so forth, pump -- rather than putting the tanks in the ground.

Q. Mr. Riss, referring to Exhibit 1054, for identification -- that is the July agreement -- that calls for 400 more new refrigerator trucks, does it not -- trailers, I mean.

A. Two hundred, doesn't it? Two hundred more, making 450 all told.

Q. Four hundred and fifty all told.

And the interest rate, I belive, was six and a half per cent this time? A. Correct.

Q. And I believe you said that Riss & Company was a co-signer of the note for the indebtedness for the trailers in 1957; is that correct?

A. Not a co-signer of the note; but, you see, Riss & Company would issue T.M. & E. a non-cancelable lease and T.M. & E. would assign that to Fruehauf for additional security.

7829 Q. So, in a sense, Riss & Company was guaranteeing the deal?

A. Well, in a sense Riss & Company would guarantee the lease of the trailers from Fruehauf, if they had to take them back from T. M. & E.

* * *

MR. AILES: I believe he said he would guarantee them to Frue-

7830 hauf.

THE COURT: See if you can clear this up.

MR. McGLOTHLIN: I am not sure I can but I will try, Your Honor.

BY MR. McGLOTHLIN:

Q. Mr. Riss, T. M. & E. is the purchaser of the trailers from Fruehauf? A. Yes, sir.

Q. It promised to pay for them? A. Yes, sir.

Q. And as part of the security for its payment it got a non-cancellable lease from Riss & Company? A. Yes, sir.

Q. That Riss & Company would use the trailers and pay rent on them? A. Yes, sir.

Q. And that lease was assigned to Fruehauf as security, was it not? A. Yes, sir.

Q. And in addition you assigned the chattel mortgage on some of your other equipment?

A. Riss & Company did not.

Q. T. M. & E., I mean?

A. Yes. But there is one thing I want to call your attention to; that Riss & Company at no time would guarantee Fruehauf what T. M. & E.
7831 owed them.

In other words, if Fruehauf repossessed the trailers from T. M. & E., Riss & Company were obligated to pay the rental on them for the length of the lease.

Q. Yes, I understand.

So, so far as Riss & Company was concerned, it was going to pay the rent whether T. M. & E. owned them or Fruehauf; is that it?

A. If Fruehauf made them available to them.

Q. This purchase in 1957, when were deliveries of the trailers supposed to commence, Mr. Riss?

A. If I remember correctly, about the first of May. The first 250 refrigerators were supposed to be delivered at that time, the vans, I believe, at a later date. I can't tell you exactly.

Q. As matters developed, the vans, ordinary non-refrigerated trailers -- were never delivered, were they?

A. That's correct.

Q. The deal was called off?

A. No, they were postponed until a later date.

Q. Well, that later date has never come?

A. That's correct.

Q. They never have delivered?

A. That's correct.

Q. It is also true, is it not, Mr. Riss, that the refrigerated
7832 vans were not delivered on the schedule that you anticipate?

A. No, that's right, they were, I think, a few in May, June, July, August, and I think it went clear into the fall. I don't remember exactly, but they were behind on deliveries.

Q. And as in the case of the '54 trailers, you were dissatisfied with the product?

A. We turned them down.

Q. What were the difficulties with the 1957 trailers?

A. Well, at the time, at the time I bought the '57 trailers, I asked for a trailer the best it was possible to build, six inches of insulation, where our 54's had three inches, and various different changes.

When the trailers were delivered we found they didn't hold refrigeration like they should. We were buying them, really, to haul frozen products, like frozen vegetables and so forth, that required first-class refrigeration.

The trailers did not keep their temperatures properly, and we turned them down, told them we would not take delivery on them, and Fruehauf sent their engineer in and their sales manager, and assured me that our tests were wrong, and if they weren't right they would make them right.

Well, we said, O.K. I had been doing business with Mr. Frue-
7833 hauf over the telephone for many, many years, and we were very close. When we proved to them the trailers were wrong, we took out some of the linings and found the insulation wasn't in properly, wasn't long enough, that there were big spaces that were not insulated, they refused to do anything about it, and for the first time in 25 years I told them I wouldn't make the payment on time.

Never for 25 years did I miss a payment with them.

So they didn't do anything about it, I quit paying them.

MR. McGLOTHLIN: I would like to have marked for identification

a copy of a letter from Transport Manufacturing and Equipment Company of Delaware, which appears to be signed by Mr. Riss, Sr., as President, addressed to Mr. R. D. Hill, Treasurer of the Fruehauf Trailer Company, dated January 1, 1958.

THE CLERK: No. 66 defendant, PRR's Exhibit No. 1055 for identification.

(Thereupon letter, Transport Manufacturing and Equipment Co. 1-1-58, signed by Mr. Riss, Sr., as President, addressed to Mr. R. D. Hill, Treasurer of Fruehauf Trailer Co., was marked Defendant 66 (PRR) Exhibit No. 1055 for identification.)

BY MR. McGLOTHLIN:

Q. Will you tell me whether this is a copy of a letter you sent

7834 to Mr. Hill?

A. Yes, I wrote this letter.

Q. By this time, which was early in January of '58, Mr. Riss, you were in serious disagreement with the Fruehauf Company on their trailers, were you not?

A. Yes, we were, and in '57.

Q. Your letter states in a paragraph numbered "1:"

"The 250 refrigerated trailers to which you referred were to have been delivered not later than May 1, 1957. However, the delivery dates were as follows:

"1 in May; 60 in June; 55 in July; 63 in August.

"The remainder of the 250 units were delivered between September 1st and October 29th."

Does that refresh your recollection as to the times of delivery?

A. Yes, I am sure those dates are correct.

Q. Further down on the first page you state:

"When the first trailers were delivered in June we were

extremely disappointed in the product.

That was true, was it not? A. Yes, sir.

Q. "The weight of the unit was considerably in excess of 12,600 pounds -- which was the weight indicated on the specifications which we later received."

7835 Do you recall how much the excess weight was, Mr. Riss?

A. There was just at first a few, and I believe they weighed around, right at 13,000, according to my memory. Later they were delivered at the proper weight, the last time.

Q. The next paragraph states:

"The Thermo-King units which were installed in the trailers were required to operate almost constantly to equal the temperatures maintained in a competitive trailer."

By the "Thermo-King units", they are the refrigerating mechanism, are they not, which are mounted on the trailer?

A. Yes. That one there doesn't have it.

Q. I realize that.

A. It is a refrigerator unit on the nose of the trailer that blows the cold air in and keeps the trailer cool.

Q. Does this indicate that the structure of the trailer itself was such that the cooling unit had to operate too much?

A. It referred that the insulation was not proper and therefore did not hold the cold in and keep the heat out.

Q. On the next page you state in part, commencing with the

7836 top of the page:

"Unquestionably the greatest contributor to the weight differential is in the Fruehauf under construction. Even today we continue to experience loss of traffic and equipment utilization because of the faulty construction of the landing supports.

How did that faulty construction of the landing supports cause you to lose traffic, Mr. Riss?

A. I didn't say we lost traffic. I didn't say that at all. Read that again. I didn't say anything about loss of traffic.

Q. I'm sorry, that's what I understood. I will read it again:

"Even today we continue to experience loss of traffic and equipment utilization because of the faulty construction of the landing steps."

A. Well, they are loss of traffic because they were in the shops for repairs, but the landing construction, maybe if the trailer was taken off the road it wasn't available, but the landing construction doesn't have anything to do with getting business other than that that was the cause for the trailer being in for repairs.

Q. What this means is because it was in for repairs you couldn't handle the traffic; is that it?

A. Yes, but the paragraph just before the one you just read was
7837 talking about something else when I was talking about the light under-structure. I said that their bodies were not built as light as they should have been and we think they saved their weight by putting on a very light under-structure that I wasn't sure would hold up.

Q. You also found, according to this letter, that it was impossible to move the tandem setting on these 1957 trailers.

Was that a setting by which you could adjust the weight distribution of the trailer?

A. That was something new in trailers. It is different than a trailer such as that.

The under-construction of the trailer, it runs on a track and has holes, bolts, where you can move it forward so you can throw more weight on the back end of your trailer or if you moved it toward the back it would throw more weight on the front of your trailer, sort of like a bridge-former, and we bought them with the sliding axles on the rear and they just weren't engineered --I mean, they were poor manufacturing, and they just wouldn't slide up and down in the track.

Q. That, again, was something that you had expected they would do, was it not?

A. Well, that is what we bought them for. We paid the price for it.

7838 Q. Paragraph 4, on page 2, Mr. Riss, you state:

"The 200 refrigerator trailers to which you refer were to have been delivered by September 16, 1957."

That was the supplemental order, was it not? A. Yes.

Q. First 250 and then 200?

A. Yes, that's correct.

Q. Continuing, you say:

"During the latter part of September delivery had not as yet been completed on the original 250 trailers and summer was at an end. The President of Riss & Company informs you that because of your failure to comply with the delivery date specified in the agreement, that it would be necessary to cancel the order on the 200 refrigerated trailers."

You did cancel that order?

A.. Yes, we did.

Q. For later delivery, I take it?

A. Because they hadn't even completed the first order, let alone about the other, and the summer was over.

Q.. Continuing in the same paragraph, Mr. Riss; you stated:

"Indeed not one of these trailers in question was fabricated until the latter part of October or the first part of

7839 November as your records will indicate.

"Because we relied on your promise of delivery of the 250 refrigerated trailers, we delivered a number of our refrigerated trailers to Fruehauf because your Sales Department pleaded they were needed for immediate sale while the weather was warm."

The reefer trailers, I take it, sell better during the summer than during the winter?

A. Well, there is more need for them when the merchandise needs to be refrigerated.

Q. Continuing:

"This represents a considerable loss of revenue to Riss & Company. Because of your non-delivery we were unable to provide equipment to many of our shippers."

That was true, was it not?

A. Yes, sir, absolutely true.

Q. Now, your counter claim of T. M. & E. and of Riss & Company against Fruehauf and the Kansas City suit, also related to deficiencies in delivery and structure of the 1957 trailers, did it not?

A. Well, I think the big end of your suit is on the '57 trailers. That suit on the 57 trailer, when you buy trailers you buy them
7840 eight or nine years in advance, and I was talking to them about purchases from '57 through eight years which would be '65 or '66 -- '65.

Q. Returning to your counter claim, Mr. Riss, your counter claim claimed damages with respect to the 1957 trailers, did it not, as well as the 1954?

A. Yes, but we weren't claiming damage done in '57. We were claiming damages that were going to be for the next eight years, for the life of the trailers.

Q. Mr. Riss, as I pointed out before, the interrogatories to the Transport Manufacturing & Equipment Company and to Riss & Company, asked in part:

"Give a detailed analysis of the computation of damages for each count of the counter claim.

And you will recall that you swore to the answers which contained those computations.

Is that correct?

A. No doubt about me swearing to that statement. Those statements were made up by people in my office and I checked with them and they said they were correct, and I signed them.

I didn't make them out.

MR. McGLOTHLIN: Your Honor, since this will also be constructed from the interrogatories which are 1051, I will mark this chart 1051-B.

(Thereupon chart was marked Defendant 66 (PRR) Exhibit 1051-B for identification.)

7841 THE COURT: All right.

BY MR. McGLOTHLIN:

Q. Mr. Riss, you were asked to compute a claim for $1,750,000 loss of profit.

Your answer reads as follows:

$1,750,000.00 loss of profits, Count 1, paragraph 7:

"Computed by R. R. Riss, Sr., as follows:

"Defendant Riss & Company was prepared to use the 250 refrigerated trailers beginning May 1, 1958, on an average revenue basis of 52 cents per mile per trailer, against which the cost to Riss & Company at above fixed cost, which it necessarily incurred during that period, would have been 22 cents per mile.

"Defendant's loss of 30 cents per revenue mile per trailer resulted in a total loss of $2,660,688.00 computed as follows:"

Let me ask you, first, the "58," I take it, is a mistake for '57, since your figures show '57, do they not? A. Yes.

Q. You made this computation, did you not?

A. I didn't make it, no. I signed it.

Q. There then follows a computation showing the number of the portion of the 250 refrigerated trailers for each month, May through

7842 November, 1957, and the total is shown of $2,660,688.00.

I will put that down.

(Notation made on Defendant 66 (PRR) Exhibit 1051-B for identification.)

THE WITNESS: Is that based on revenue of 52 cents per mile?

BY MR. McGLOTHLIN:

Q. I will show you your computation on it (handing to witness):

You were also asked, Mr. Riss, for a computation of the cost of excess operation of refrigeration units, and your answer, in your sworn answers to interrogatories, was "something over $43,000.00.

Would you verify for me, are those figures correct, paragraph 4 on page 3 of your answers to interrogatories (handing), Mr. Riss?

A. You mean this total (indicating).

Q. It is here.

A. Yes, that is based on operating 80 per cent in excess of a light trailer of another model or another make.

Q. So that the jury may understand how this figure was arrived at, I will read the complete explanation:

"Based on defendant's estimates of 80 per cent excess operating time of the refrigerating units, total hours of operation

7843 of cooling units in Fruehauf reefers was 54,622 hours.

"Cost of unit operation is $1.00 per hour, cost of excessive operation of units, 80 per cent of $54,622.00 times 100, is $43,697.60."

You were also asked, Mr. Riss, to compute your claim for damages for other defects which had been originally $100,000.00.

Your answer says:

"$100,000.00 for other defects, Count 1, paragraph 7, which will be amended accordingly.

"Computation made by R. R. Riss, Sr., and J. J. McCleary."

And these figures are shown in that answer:

"Warranty items, $3,104.35;

"Loss of use of equipment during repair of warranty items, $15,120.00.

"Loss of revenue from excessive weight, $42,947.32."

I will read the complete explanation so the jury can see how these work out:

"Warranty Items:"

The complete explanation is --

"Warranty items:

"Expense incurred for repairs for which plaintiff is obligated under warranty."

7844 These are things that went wrong that the warranty covered that you had paid for and were demanding reimbursement; is that correct?

A. Correct.

Q. And the next item:

"Loss of use of equipment for 140 days out of service during repairs of warranty items, at $108.00 per day."

This is when you couldn't use the trailer because it was being fixed for a warranty item; is that it?

A. Yes, that's correct.

Q. And finally, "Loss of Revenue from excessive weight, computed on an average weight of 13,030 pounds, which is 430 pounds over specifications.

"Total miles traveled by trailers is 4,657,818, divided by 900, average trip length, equals 5,175 trips.

"Defendant's average revenue per 100 pounds per trip during the period was $1.93.

5,175 trips times 4.3 times $1.93, equals $42,947.32.

Mr. Riss, you were also asked as to an item in your counter claim which referred to permanent and continuing damage from loss of

customers and good will.

Your earlier answer had referred to $3,000,000.00 in this
7845 amount.

Your interrogatory answer says that that $3,000,000.00 was covered by some other items. It then continued, "an additional amount" --

MR. WRIGHT: I think it would be more profitable if the answer itself were read.

THE COURT: I think it would make it clearer if you read the answer.

MR. WRIGHT: Instead of Mr. McGlothlin undertaking to say what is in it.

THE WITNESS: To save you some time, that had been cancelled. That was cancelled, was ordered cancelled a long time ago, that one item.

MR. McGLOTHLIN: I will read the answer.

The interrogatory is:

"Give a computation of your claim."

The claim in the complaint had been $3,000,000.00.

This is the answer in the interrogatory which I will now read, paragraph 6 on page 3:

"$3,000,000.00 damage to business, and so forth -- Count 2, paragraph 2.

"This figure includes the damages covered by sub-paragraphs 1, 3, 4 and 5 of this paragraph 1-C, totaling $2,965,557.27.

"An additional amount of $2,000,000.00 is esti-
7846 mated by R. R. Riss, Sr., as permanent and continuing damage to defendant Riss & Company from loss of customers and good will."

"Defendant's counter claim will be amended accordingly."

THE WITNESS: That is the part that has been cancelled, and it has been cancelled on the part for good will and loss of customers.

By 1957 we didn't have much good will and customers left, after this charge in this case.

MR. BALL: I move to strike, if the Court please.

THE COURT: All right, I will grant your motion.

BY MR. McGLOTHLIN:

Q. Mr. Riss, there isn't any doubt in your mind, is there, that in September, 1958, you swore to the $2,000,000.00 figure?

A. No doubt in my mind, and it was called to my attention and I had it cancelled, that portion of it.

* * *

7847 BY MR. McGLOTHLIN:

Q. Mr. Riss, I call your attention to paragraph 4 of Count 3 of the amended counter claim of T. M. & E. and Riss & Company, which reads as follows:

> "In addition, in reliance upon plaintiff's aforesaid representations concerning the time of delivery and quality of said refrigerated trailers, defendants approached many of their customers and many potential customers and advised them that defendants would in the spring and summer of 1957 be able to supply them the finest refrigerated transportation service available, but because of the wrongful and fraudulent conduct of plaintiff as heretofore alleged, defendants were unable to supply such service with the result that defendants have permanently lost many customers and many potential customers from whom defendants could have reasonably expected a large volume of refrigerated traffic, and have thereby suffered lasting and permanent injury to
> 7848 their business and reputation, all to defendants' additional damage in the sum of $2,000,000.00."

That was the position of T. M. & E. and of Riss & Company on April 8, 1959, was it not?

A. No, sir, it was not. I had ordered my attorneys to take that paragraph out of the complaint. When they filed this new complaint it was called to my attention, and it has since been adjusted. That is out of the complaint as it stands today.

* * *

CROSS EXAMINATION OF MR. RISS

BY MR. WHEELER:

* * *

8035 Q. Mr. Riss, isn't it a fact that in 1954 business in the trucking industry was down generally as against 1953?

A. Very slightly. There was some slight decline in '54 and I think mostly because the Korean War was over, business generally was off a little; not too great an amount.

Q. Well, some of your competitors were complaining rather bitterly that it was off quite a bit, were they not?

A. No one but the railroads that I heard of. I don't know anybody that complained.

Q. Mr. Riss, are you of the opinion that all motor carriers' explosives traffic declined in 1954, from 1953? A. It all declined.

8036 Q. That each motor carrier that was hauling explosives and ammunition, ammunition and explosives for the Government, their traffic declined in 1954 in comparison to 1953?

A. I would say that anyone that was doing a very large business in '53, they were doing less business in '54. There could be a rare occasion, however, there might be someone that -- for instance, someone that handled some freight that we had been handling, after our rights were cancelled out, that might have gotten more business in '54 than they did in '53.

Q. How about '55 as against '54?

A. I would say that as far as we were concerned, our business

held pretty equal for '55 and '54.

Q. Do you think that was the experience of other major motor carriers handling ammunition and explosives?

A. I just don't know what they were doing then.

Q. You hadn't investigated that? A. No.

Q. How about '56; have you investigated the facts with respect to that?

A. No, only I know business was off some in '56. It went off quite a lot, after '56, because there was very little explosives hauled after that.

Q. How about '57?

8037 A. Very little.

Q. '58?

A. We are still hauling a few loads.

* * *

JOINT APPENDIX

VOLUME VI

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 16,206, 16,255, 16,376

THE ASSOCIATION OF WESTERN RAILWAYS, TRAFFIC EXECUTIVE ASSOCIATION-EASTERN RAILROADS, EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,		
	Appellants,	Nos. 16,206 and 16,376
v.		
RISS & COMPANY, INC.,		
	Appellee.	
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.,		
	Appellants,	No. 16,255
v.		
RISS & COMPANY, INC.,		
	Appellee.	

Appeal from a Judgment of the
United States District Court for the District of Columbia

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For the
District of Columbia
FILED OCT 16 1961
Jack W. Stewart

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CROSS EXAMINATION OF MR. RISS BY MR. WHEELER

(Memorandum of Defendant Railroads Objections to Plaintiff's Exhibits 244 and 245 on charts and maps is as follows:)

8127

1. No proper or adequate foundation has been laid.

2. The exhibits do not tend to prove or disprove any issue in this case, and are wholly irrelevant.

3. No competent evidence has been introduced which constitutes substantial proof that the introduction of any one of the bills represented on the chart and map was initiated or caused by any action of any defendant.

4. The uncontradicted evidence in the record shows that these bills were introduced in the state legislatures by legislators who were admittedly neither co-conspirators nor agents of any defendant in carrying out the alleged conspiracy.

5. The record contains no evidence whatsoever that the introduction of these bills in state legislatures was requested or sought by any defendants; to the contrary, the record already contains affirmative evidence showing without contradiction that these bills were supported and sponsored by individuals and organizations which admittedly were neither co-conspirators nor agents of any defendant in the carrying out of the alleged conspiracy.

8128

6. The chart and map show on their face that the majority of the bills in question (six) were introduced in the legislatures of states in which the plaintiff has no operating rights, as shown by Plaintiff's Exhibit 2; and this fact makes unreasonable any inference that the introduction of these bills, no matter by whom, could have been an overt act in a conspiracy directed against the plaintiff.

7. Even if the introduction of these bills had been shown by competent evidence to have been legally caused by these defendants or any of them, the bringing about of consideration of such legislative proposals would have been wholly an exercise of rights guaranteed to these defendants by the First Amendment.

8129 8. As to each defendant, some if not all of the evidence essential to plaintiff's argument as to causal connection is hearsay and incompetent.

* * *

CROSS EXAMINATION OF MR. RISS BY MR. GATES

* * *

8283 Q. Now, in 1954 Riss & Company, or T.M. & E. bought about $14,000,000.00 worth of new equipment, didn't they?

A. T.M. & E. did, yes.

Q. That was the biggest single purchase that had ever been made; is that right?

A. Correct.

* * *

8470 Q. Now, we were discussing the annual report of Eastern Express, Mr. Riss. Does it not appear clearly to you from an examination of page three, of exhibit 239-A, that Vigo Trailer Rentals, Inc., and House Trucking Company, Inc. are under common control with Eastern Express?

A. I think it shows that the owner, the same owner controls all companies, yes. I do not think it shows that Eastern Express owns those companies, but the same man owns the stock in Eastern and that same man owns the stock in other companies.

Q. That is right. That is the same situation that you have with respect to Riss & Company and TM&E, isn't that true?

A. All except control. I do not have the majority stock in either company.

Q. Now, Mr. Riss, let us start with TM&E; if you do not control TM&E, who does?

A. I have a big influence in TM&E. There are no stockholders besides my children and myself. I certainly have influence over my children. As far as getting to do what I want to do in TM&E, I certainly do. As far as legally controlling TM&E, I do not.

8471 Q. But in operation of TM&E, is it not a fact that you control it today?

A. If I wanted TM&E to close its doors tomorrow, I am certain that would happen.

Q. And that was true in 1957 and in 1953, was it not?

A. Ever since it has been organized.

* * *

8484 Q. Mr. Riss, what I am getting at is this, without having before you the contracts between Eastern and its affiliates, and the books of the affiliates, to see whether the affiliate made or lost money, you cannot really tell whether Eastern made a true profit in 1957 or a paper profit, can you?

A. Why I can only go by the figures that they publish with the ICC. I have no other way of knowing, no one else would.

Q. You do not know what the effect of a consolidation of a parent with the subsidiary affiliate would be?

A. They could have been robbing each other blind, and you would not know it unless the statement showed it.

* * *

OUT OF PRESENCE OF JURY.

8757 THE COURT: What about this part of his offer, Mr. Wright, which talks about the penalties for overloading, which were deductions claimed -- the so-called, at least, intimations of admission that now he owes that much -- that part might be admissible?

MR. WRIGHT: It's true. Mr. Gates' version is different from the version given to me by Mr. Riss's tax lawyer. That's all I know about.

THE COURT: He might be permitted to cross examine.

MR. WRIGHT: He --

THE COURT: Suppose you put Mr. Riss on the stand and let him ask him about that item and see what the facts are.

MR. WRIGHT: All right.

MR. GATES: Your Honor, this is outside the presence of the jury, so I assume I am entitled to a little more latitude.

THE COURT: That's right. I will let you cross examine him about that item -- either $40,000 or $60,000 and find out what the facts are in regard to that.

MR. GATES: All right.

MR. McGLOTHLIN: Well, if Your Honor please, if we are going to have evidence in the record from this witness, I would like to have it on behalf of my client in front of the jury.

8758 Whereupon

RICHARD R. RISS

resumed the witness stand, and having been previously duly sworn, was further examined and testified as follows:

THE COURT: Well, I want to find out whether it is admissible first. Now, let's --

MR. McGLOTHLIN: Well, I understood Your Honor to rule yesterday that no questions with respect to the tax matter were going to be asked--

THE COURT: I didn't rule -- I didn't say anything about matters that had already been settled.

I am talking about this broad claim four million, eight hundred and some thousand dollars.

Now, if the liability has been settled as to a $40,000 or $60,000 item, the Government has ruled against the plaintiff, then under the theory of the Jelleff case, I probably might admit that.

I want to hear what the facts are, but I am not going to permit a broad sweeping cross examination in this case for the reasons I stated yesterday.

And all counsel knows the Court's feeling. In order to get before this jury that the plaintiff faces a claim of about $5,000,000 and, therefore, he must be dishonest or the intimation might be made that he was cheating the Government -- I think that's a collateral matter -- until that claim has been decided against the plaintiff, it has no place in this case by cross examination or otherwise.

8759 That does not relate to a part of that claim to which, in effect, the plaintiff has lost by not being able to convince the Department of the Internal Revenue that his deductions were fair and proper.

I think you understand the Court's feeling.

MR. McGLOTHLIN: For my purposes, Your Honor, it is literally immaterial, the amount of the Government's claim, whether it's $5,000,000, or $50,000,000, or $50,000. From my standpoint, it's immaterial.

What is material is that a figure -- what is material is the presenting to the jury the existence of a fact which makes a figure which has been put before the jury and firm --

THE COURT: What figure are you talking about?

MR. McGLOTHLIN: The fact that the tax liability is still undetermined.

Now, whether it goes up or whether it goes down, or whether it goes sideways, that figure is not a reliable figure.

Now that, from my standpoint, is the important one. I don't quarrel with --

THE COURT: Suppose you ask the witness: Has the tax liability been finally determined -- and he says, "No, it has not been finally determined"? --

MR. McGLOTHLIN: You have gone part of the --

8760 MR. GATES: Your Honor, you told me yesterday I couldn't do that.

THE COURT: I don't want you to go into what the Internal Revenue does. Now they have got a claim for $4,800,000. You see. That's the part I am not going to let in this case.

MR. GATES: The amount.

THE COURT: The fact that it's not finally determined means there may be some litigation pending about it. I may let you go that far, but I am not going to let you bring in --

* * *

MR. McGLOTHLIN: I think my difficulty with the other approach we are getting into now, Your Honor, is this: I am myself not clear how it is you can take a step, have you, or have you not admitted that a portion of your tax was understated -- and not at least mention the fact that the admission, as we claim, was made in connection with a claim -- in unstated amount, as far as I am concerned -- a claim by the Government that the tax was understated --

8761 And the reason I am on my feet now is, it seems to me that we are going to get in great difficulty, if you can say you can ask a little bit about the tax claim, but you mustn't mention the tax claim -- it seems to be inconsistent.

Now, I would -- for myself, my own client - I would not object to a ruling by Your Honor that the amount of the tax claim by the Government shouldn't be brought to the jury, because I understand Your Honor's concern, and I would be concerned, that the amount itself is so large, that the statement of the amount might be unfairly prejudicial to the plaintiff.

So that part of it is out, so far as I am concerned.

But it does seem to me difficult to say, "Haven't you conceded that your tax is understated?" without referring in some measure to an assertion by the Government that it was understated, because it is common knowledge -- I have never heard of anybody who volunteered to pay more taxes.

MR. WRIGHT: Are you through?

MR. McGLOTHLIN: Thank you.

MR. WRIGHT: What Mr. McGlothlin has just said merely emphasizes the plainly prejudicial purpose of every one of these questions.

Now that figure for taxes accrued that is up there on the board is no different from the figure that appears in any statement audited or otherwise as of the end of a particular year. Whatever the tax figure is in the statement, it

is always no more than an estimate. It is always subject to review and this figure is no different than any other in that respect.

8762 And the fact that it is invariably, not only in this, every one of the Form A's, every audited statement, every figure of that kind is no more than an estimate--has never, never been sought to make statements of this kind inadmissible in evidence, nor has it ever been thought to be an excuse for them questioning the party who offers it about what the nature and extent of subsequent proceedings, in this case, seven years later, between the Revenue Service and the corporation as to the amount of the tax.

And I want to emphasize again that insofar as the plaintiff's claim for damages in this case is concerned, the amount of that tax is wholly immaterial.

No damage has been claimed on the basis of a net worth of $3,000,000 or of $1,000,000 or of $5,000,000 at any particular time, or ever will be.

The damage claim was based on a value of $9,000,000 as of the end of that year, which is not in any sense based on any net worth figure that is there.

It is based solely on an estimate of what the company would have been worth, given earnings of a certain amount.

THE COURT: Mr. Shea.

8763 MR. SHEA: Your Honor, I want to say on behalf of my clients that I would be in agreement with Mr. McGlothlin.

I should not take exception to the ruling which barred the statement of the amount of the claim which has been made by the United States.

And I don't want to repeat anything that I said yesterday. This can't be up here. He has had him testify that the net worth in 1953 was $3,235,033. Now, that wasn't put up there for nothing.

And it is highly prejudicial on this issue of damages to have that net worth put before the jury on the basis of the testimony of Mr. Riss that that was his net worth, when it is known that it isn't a true figure.

And it isn't a true figure because, at least, there is some additional tax and in point of fact the tax--

THE COURT: Well, you say "some additional tax." That, to me, doesn't mean much, when you say "some." Maybe the Government might succeed in getting $100,000 additional tax. They may wind up with nothing.

MR. SHEA: All I am saying, Your Honor, is that you and I know now that if Mr. Riss has told the jury that that was his net worth in 1953, we know that isn't true because we know that that tax item up there isn't going to stand up.

THE COURT: How do you know that?

MR. SHEA: Well, we don't know what it will be. We know that that isn't going to be it.

8764. THE COURT: I mean, isn't that a matter of speculation? How do you know it won't stand up?

MR. SHEA: All I am saying is that we know that it isn't fixed. We know that that isn't it. I mean --

THE COURT: You mean, the Government challenged that?

MR. SHEA: The Government has asserted it's a deficiency.

THE COURT: That doesn't mean the Government is right about it.

MR. SHEA: No.

THE COURT: They could be wrong as well as right.

MR. SHEA: Your Honor, I am not asserting the Government is right. All I am asserting is that when Mr. Riss said that that was the net worth of the company, you and I know that that isn't a reliable net worth, because, one item that goes into it, you and I know, it remains still to be determined.

And we don't -- we won't know what would be the reliable figure until it is determined.

THE COURT: What would you suggest we do -- postpone the case until the end of --

MR. SHEA: No --

THE COURT: -- it's settled?

MR. SHEA: I think that -- my feeling about this is, without stating the amount of the Government's claim, we are entitled to have the jury know that that figure which Mr. Riss said was his net worth, they can't rely on as being his net worth because no one is going to know what his net worth was until that tax figure is finally determined.

8765 And that tax figure has not been agreed to by the Government. They have asserted a deficiency and that remains to be determined, and until it is determined, when Mr. Riss says that was his net worth in '53, he can be impeached.

THE COURT: All right.

MR. SHEA: It isn't true. I mean that's --

THE COURT: All right.

MR. SHEA: The only reason I rose, Your Honor, was to say that I, too, agree that if the ruling were that we couldn't show the amount--

THE COURT: All right. I have already ruled about that. Let's proceed. I ruled on that yesterday. Overruled. Let's proceed.

MR. GATES: Now, Your Honor, you are not even going to permit me to examine Mr. Riss?

THE COURT: On this one item, this one, I will permit you to examine on this question as to whether or not the question of deductions has already -- penalty paid, and fine, etc.

MR. GATES: I understood that Your Honor wanted that done outside of the presence of the jury.

THE COURT: I want to find out what the facts are as to that item.

8766 MR. BALL: May I make a point that there are a number of other matters. We used the overweight only as an illustration.

THE COURT: All right. Let's find out. You may examine him about that.

CROSS EXAMINATION (Resumed)

BY MR. GATES:

Q. Mr. Riss, you have testified that in evaluating a company,

you would consider three times before tax earnings and six times after tax earnings, did you not?

A. I said three times before the earnings, I said, or six times which, figuring the taxes 50 percent, I believe, using that for an example.

We say three times is the most -- is a very, very conservative minimum and we would consider the worth of the goodwill of the company, yes, that's right.

Q. But you also said that six times the after tax earnings was a conservative figure, did you not?

A. You said something about -- someone said something about the tax -- that I was basing it on the fact that tax-- in half -- so if three is the whole, six is the half.

MR. WRIGHT: If the Court please, it isn't proper to have cross examination on his own cross examination. What he is here to examine Mr. Riss about is Mr. Riss's direct examination. Now, he can't say that because he brought out on cross examination some other kind of estimate that he is supposed to -- he can set up another kind of estimate and then knock that down. He has to devote himself to the estimate that was made on the direct examination, which is the one which we put forward.

8767 He can't now start talking --

THE COURT: Why can't we get --

MR. WRIGHT: -- About other estimates --

THE COURT: Why can't we get right down to the issue and find out what the facts are regarding this $40,000 item or $60,000?

Let's find out what that is. I think this witness has been cross examined long enough, frankly, on these matters.

I think you have had all the time that you would -- frankly, you have been given more latitude than I think you should have been given, but I have given it to you.

Now, everything is before the jury except this matter of the $40,000 or $60,000 item.

BY MR. GATES:

Q. Mr. Riss, has Riss and Company's tax liability owed to the Federal Government for the year 1953 been finally determined?

A. No, sir.

* * *

8768 Q. Is it not a fact, Mr. Riss, that in the early part of the year 1956 the Internal Revenue Service of the United States Government made claim upon Riss and Company that there were additional taxes due and owing for the years 1952 and 1953?

8769 A. Yes.

Q. And the amount of the taxes which the Federal Government claimed to be due and owing was in excess of the amount of taxes accrued as shown on Exhibit 236, namely, in excess of $1,924,614?

A. The Internal Government contends that Riss and Company made some $2 million more in '53, that their assets were some $2 million more in '53 than our statement showed, yes.

MR. GATES: Now, if the Court please, if Mr. Riss wants to volunteer that kind of an answer, I submit to Your Honor he really opens up the door to an extensive cross examination on the question of his tax liability.

THE COURT: Well, that is just the reason I said yesterday, we are not going to get into this business -- I mean, this tax claim of the Government, because one thing leads to another.

MR. GATES: That's exactly right.

THE COURT: Then he ought to bring his auditors in here, his accountant, to show what their position is.

I am not going to try that tax claim.

MR. GATES: I --

THE COURT: All right. Now, I have gone far enough on this, gentlemen --

MR. GATES: May I move to strike that answer?

8770 THE COURT: All right.

MR. GATES: As being non-responsive.

THE COURT: Motion to strike is granted for the reason as stated. Now, let's --

MR. GATES: Miss Reporter, will you please read my question to Mr. Riss?

(Whereupon, the following question was read:)

Q. And the amount of the taxes which the Federal Government claimed to be due and owing was in excess of the amount of taxes accrued as shown on Exhibit 236, namely, in excess of $1,924,614? ..

BY MR. GATES:

Q. I think you can answer that question, yes or no, Mr. Riss.

A. I don't see how I can, on a question like this. I just don't see how I can.

THE COURT: Well, was it in excess of that figure of one million, nine hundred --

THE WITNESS: Well, you got to know why it's in excess.

THE COURT: I understand, but you can say --

THE WITNESS: Yes, it was.

THE COURT: -- "Yes, it was," and I will give you a chance to explain it.

* * *

8788 Q. Now, did you apply that same vehicle-miles-operated formula in deciding how the $1,500,000 should be divided as between the years 1956 and the years 1954 and 1955?

A. I do not think so.

Q. That was just an arbitrary decision on your part?

A. That was just a decision I made, yes, sir.

* * *

8931 Q. Would you look at Exhibit 231, Schedule 9009, and see if that will refresh your recollection?

A. What page?

Q. It is along toward the back, Mr. Riss. A. I have it.

Q. How much was it for rent?

* * *

8931 A. It looks like $4,794,726.

Q. That is right.

Now, how much of that was rent for the 500 tractors and the 1216 trailers which T.M. & E., purchased in 1954?

A. If you had the '54 statement, the audited statement, I could tell you exactly.

8932 Q. You are referring to TEA's Exhibit 5020, Mr. Riss?

A. I think that's the one, yes, sir.

It looks like the second year -- did you ask me about '55?

Q. 1954. A. All right. We paid $3,084,000.

Q. Out of the $4,794,000, $3,084,000 was paid on account of these 500 trucks and 1216 trailers? Am I correct? A. Correct.

Q. Now, I believe you testified that the rent on these tractors and trailers was calculated by paying depreciation on a double declining balance basis, including interest, plus ten per cent -- plus $10 a unit per month? Am I right?

A. On the tractors, I believe it was more than ten. It strikes me it was 25, but it could have been ten. The trailers were ten, I know, and I forget what the tractors were.

Q. Now, what was that $10 a month supposed to cover?

A. To cover T.M. & E.'s costs for billing and for all the work T.M. & E. had to do. It was just merely a cost for -- more than it would have cost Riss & Company if they had done it, administered it. I mean, that they would have had that additional cost.

MR. GATES: I will move to strike that last, more than it would cost Riss & Company, Your Honor.

8933 THE COURT: Well, repeat the question.

MR. GATES: I intend to develop whether or not it would cost more or less.

THE COURT: Let us repeat the question.

MR. GATES: I asked the witness what the item of $10 per month was supposed to cover.

THE COURT: Well, will you tell us what it was supposed to cover?

THE WITNESS: Yes. It was supposed to cover the bookkeeping of operating those trucks.

BY MR. GATES:

Q. Now, there were a total of 716 units, weren't there, Mr. Riss -- a total of 1716 units?

A. You said seven. Seventeen is correct, sir.

Q. And at $10 per unit per month as a minimum, that is $17,160 a month, isn't it?

A. That is correct.

Q. And about $267,000 per year; isn't that right?

A. Correct.

Q. How much do you pay your bookkeeper?

A. Well, one bookkeeper doesn't do it. We have quite an organization.

Q. You have quite an organization? A. Yes.

Q. How much were your salaries and wages for T.M. & E. for the year 1954?

8934 A. Well, I can't tell you. I don't have that statement before me.

Q. Well, maybe I can help you out.

I show you TEA Exhibit 5010 for identification, which is the 1954 income tax return, and ask you if it doesn't show that the total salaries and wages for the year 1954 was $37,121?

A. That is for the salaries and wages of employees, and $32,571 for management.

Q. And who got the $32,571 for management?

A. Whoever was in charge of T.M. & E. at that time.

Q. Well, didn't you get $25,000 out of that $32,000, yourself?

A. In '54? Q. Yes, sir. A. I don't believe so.

Q. Well, I will show you Schedule 9 of the income tax return and ask you if that doesn't show that Richard R. Riss, as president, got $25,947 and Miss Gladys Rideout got $6,644, making a total of $32,591?

A. No, sir, that is not right.

Q. Isn't that what that shows?

A. It shows Richard R. Riss the second. That happens to be my son.

8935 Q. All right. Then your son got it? A. Yes, sir.

Q. Now, isn't it true that those two people, who were the management, got the entire $32,000?

A. It says Richard R. Riss, Senior there; nothing.

Q. You didn't get paid that year?

A. That is right. They got the 32,000.

Q. They didn't do the bookkeeping, did they? A. No, sir.

Q. Now, I ask you, isn't it a fact that the salaries and wages for the entire bookkeeping staff for which you charged $206,000 is represented by an item of $37,000 shown on your income tax return?

A. Oh, no. There is other things in there, too, you know. You have investments. Aren't you supposed to make some money off your investments?

Q. Mr. Riss, didn't you testify a minute ago that the $10 per unit was intended to take care of bookkeeping costs?

A. Yes, sir, that is what I testified to, but there are other things to consider in the company beside the bookkeeping. That is a very mere amount. I don't think anybody would talk about a $12,000 truck for less than

$120 a year profit, even if it was all profit.

Q. So that out of this $206,000 you had something in the order of a $70,000 profit, didn't you?

8936 A. We could have had more than that. I don't know. What does it show?

Q. Well, didn't we just agree that the $10 a month for each of those units was $207,000, roughly?

A. Oh, there are other expenses, attorney fees, and that is a very big expense, you will notice there. There is a lot of other expenses there that go to make up T.M. & E.'s expenses statement. You only have labor there, I believe. There are many other expenses.

Q. You said, Mr. Riss, or you agreed, that the depreciation was calculated on a basis of double declining balance?

A. That is right.

Q. Now, we have already defined or explained straight line depreciation, and that is the situation where you divide the cost of the equipment, less the salvage value, by the number of years of useful life, and you had the same amount of depreciation for each year; isn't that right?

A. That is the straight line, yes, sir.

Q. Now, can you explain double declining balance depreciation?

A. Yes. Q. Would you do so?

A. Yes, sir. On these tractors, for instance, the normal life agreed to by the Internal Revenue people is four years. So if you have straight line, you would take 25 per cent of the depreciation each year.

8937 On double declining, we took 50 per cent the first year; 25 per cent the second year; 12-1/2 per cent the third year; and 12-1/2 per cent the fourth year.

Q. Excuse me, Mr. Riss, isn't it --

A. It all equals 100 per cent in four years.

Q. Excuse me, but isn't it 6-1/4?

A. Well, I mean it graduates down, but that is the way. It is really less.

Q. Now, in order that the jury will understand exactly what we are talking about, let me give you a hypothetical case, and you tell me if I am right.

Assume that a tractor cost $8,000. I know that is cheap. But the arithmetic works out easier with $8,000.

A. All right, sir.

Q. And assume also that you feel that you have a ten per cent residual life, or $800. A. Yes, sir.

Q. Now, on straight line depreciation, we have got $7200 to depreciate over four years, haven't we? A. Yes, sir.

Q. And that would amount to $1800 a year?

A. That is correct.

8938 Q. Now, on the double declining balance, you start with the $8,000, and the first year you depreciate one-half or $4,000, don't you?

A. Correct.

Q. And the second year you depreciate one-half of the balance of your depreciation, which turns out to be 25 per cent or $2,000?

A. Correct.

Q. And the third year you depreciate it one-half of the quarter you have left, which turns out to be $1,000; isn't that right?

A. That is correct.

Q. And so that at the end of three years you have got $7,000 depreciation built up; correct?

A. At the end of four years, you have --

Q. Now, wait a minute. And the fourth year you would take one-half of the eight that is left, but because that is more than $200, in other words, the difference between $7200 and $7,000, you only take off $200 the last year because that is the rest of the depreciation; is that right?

A. No; no, that is not right.

Q. Well, you check my figures overnight and tell me tomorrow if I am not right about it.

A. No, but I say that is not the way they figure it.

The next year you would take off $500 and then you would stop and still hold $500 on your books as salvage value.

8939 Q. Now, Mr. Riss, didn't we agree that this truck had $800 value for salvage?

A. That is what you agreed on straight line. Q. No.

A. Oh, yes, you did. Straight line you are talking about. That is $800 salvage value.

Q. If you decided with respect to your residual value --

A. Of course, if you --

Q. Just a minute, Mr. Riss.

If you decided as an accounting matter, with respect to residual value of your trucks, that they had ten per cent residual value --

A. If you say that yes; yes, sir.

Q. What did you have for your tractors? A. None.

Q. No residual life at all?

A. That is right. On double deduction, on double declining, you do not have.

* * *

8965 Q. And you also represented TM&E in this regard?

A. That is what I just said, acting as a representative of TM&E, I talked to Mr. Green who was vice president of Thermo.

Q. And you also represented Riss in this transaction?

A. Then being close to Riss & Company, you said while ago I had pretty much control of both of them--I talked to Mr. Riss of Riss & Company and got the deal through for Riss & Company.

Q. Now, the "Mr. Riss in the Riss & Company that you talked to, does that mean that you were talking to yourself?

A. I was looking in the mirror.

* * *

9002 Q. When you selected the six companies which you put on the board there in Exhibit 243-A that you selected about four or five weeks ago now, it has been, did you consider any others?

A. I only picked a half a dozen companies that served within the same territory that I served, and that is what they were picked from.

Q. Now, is your answer that --

THE COURT: Just a minute.

The question, I think, was, did you select any others?

9003 BY MR. GATES:

Q. Did you consider any others?

A. No, I did not.

Q. You just picked out these six; is that correct?

A. That's correct.

Q. Now, you have testified that you considered, (1), the territories in which they operated, or the States, and (2), the routes that they served.

Now, did you consider any other factors?

A. I was merely considering the territory they served as compared to us, mostly, and that's what I was trying to compare. It's almost impossible to compare one company with the other and I come as near it as I could possibly pick companies.

MR. GATES: I am going to move to strike that answer, if the Court please. I asked him whether he considered any factors other than territories and route service.

THE COURT: Well, did you consider any other factors, other than the two mentioned by Mr. Gates?

THE WITNESS: Well, there's a lot of factors come into it, Your Honor.

THE COURT: Then the answer is, I suppose, if you considered

other factors -- it would be yes. If you didn't, the answer would be no.

9004 THE WITNESS: I can't tell you what the factors were. Every time I start telling him what the factors are, he stops my conversation and says strike it. How can I answer him? These are the ones I picked.

THE COURT: Put the propounded question again.

Ask the question again.

BY MR. GATES:

Q. Mr. Riss, in selecting the six carriers which you chose as comparable carriers, the names of which appear on Exhibit 243-A, did you consider any factors other than the territories served, and the routes served?

THE COURT: Now, you can answer. Whichever way you answer the question --

THE WITNESS: Yes.

BY MR. GATES:

Q. All right, what other factors did you consider?

A. I considered factors of companies that I had known for some time, and had known of them making progress about the same or along the lines we were.

MR. GATES: Now, just a minute.

I move to strike that, Your Honor.

THE COURT: You asked him what factors he considered.

MR. GATES: All right, and I would like to have the reporter read back the answer.

9005 THE COURT: All right, read it.

(Question read:)

MR. GATES: Now, if the Court please, what he has said is a factor, is a company he has known, and he thinks they are making progress along the same line he is.

I submit, Your Honor, that neither of those is factors.

THE COURT: Well, it may be hearsay. He may have heard it

from somebody.

MR. GATES: No. Your Honor, it is not a factor. It is an observation that he is making, and I want to know what factors he considered--

THE COURT: Now, give us an illustration of what you mean by "other factors."

MR. GATES: All right.

THE COURT: Let's see if you can crystalize your thoughts here.

Let's find out if the witness is thinking --

MR. GATES: Your Honor, there's no problem about crystalizing my thoughts on this subject.

THE COURT: I know, but we have got to find out if he understands the nature of your question:

What do you mean by "factors?" Give us an example?

MR. GATES: I will give you a specific example:

9006 Did he consider the factor that two of the companies that he has chosen up there on the board were in bankruptcy proceedings?

THE COURT: Let's find out.

Did you consider that?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. GATES:

Q. You did? A. Yes.

Q. And which two companies were in bankruptcy in 1953?

A. General and Yellow. They weren't in bankruptcy, but General was in very bad circumstances. I don't believe they were in bankruptcy, and I don't believe that Yellow was in bankruptcy, but they were both financially in bad shape.

Q. You don't know whether they were in bankruptcy in 1953?

A. Yes, I know they were not in bankruptcy.

Q. Neither one of them?

A. No, sir.

Q. All right.

Now, other factors which I am talking about are such things as traffic density, hours of utilization, loads, numbers of units of equipment,
9007 capitalization, debt versus equity, et cetera, et cetera, and what other factors other than territories and routes did you consider?

A. Traffic density, as you call it, would be the same for them as it is for me.

Loading of trucks would be the same --

MR. GATES: I didn't ask him to define density, Your Honor.

THE WITNESS: Let me answer the question, please.

MR. GATES: The thing I asked him was, what factors he considered. When he names them we will go forward from that.

THE WITNESS: I didn't add on the other factors. What's the use, sir? I had no other factors.

* * *

9016 Q. Does any of the six companies which you put on the board have a 3,000 route mile service from New York to Los Angeles?

A. Denver-Chicago.

Q. Direct service? A. Yes, sir.

Q. And that is the only one? A. Yes, sir.

Q. Is that the only route that Denver-Chicago operates?

A. No, sir.

Q. Does any company other than Denver-Chicago of the six you have named have a route between New York and Los Angeles?

A. No, sir.

* * *

CROSS EXAMINATION OF MR. RISS

* * *

BY MR. BALL

9175 Q. Now, since you resigned the presidency of Riss & Company in 1945, and in every since then, through 1957, you were listed only as a part-time employee of Riss & Company on its tax returns; were you not?

A. I don't think so.

Q. Now, I hand you, Mr. Riss, what has been marked as AWR Exhibit 88, for identification, which is a copy of the Riss & Company corporation income tax return for the year 1949.

9176 (AWR Exhibit No. 88 was marked for identification, Copy of Riss & Company Corporation Income Tax Return for year 1949.)

BY MR. BALL:

Q. I call to your attention the schedule appearing therein, "Compensation of Officers," and I ask if it doesn't have a column headed, "Time Served," and opposite your name, the word, "Part" appears?

A. That is what it has there. I have never seen that before. But I certainly was there more than part of the time.

Q. Will you accept my word that for every year through 1957, that you were listed as a part-time employee of Riss & Company in the income tax returns of that company?

A. If you say they are on there, I will have to take your word for it, but that doesn't make it so.

Q. Now, Mr. Riss, you testified, did you not, under oath, in a case in the State of Missouri, State of Missouri vs. Riss & Company, a quo warranto proceeding, on April 8, 1957; isn't that correct?

A. I testified in that case that has to do with this case, yes.

Q. This is the suit -- do I need to identify this case in Missouri

9177 as the suit in which the --

A. This is the case that was part of the cause of this suit,

yes. The State of Missouri vs. --

THE COURT: What is the title of the case?

THE WITNESS: -- vs. Riss & Company.

MR. BALL: I move to strike his answer out.

THE COURT: All right, I grant the motion to strike.

Will you agree on the title of the suit, Mr. Wright?

MR. WRIGHT: I would suggest, Your Honor, if he has a fact he wishes to develop, he ask about the fact first, and then we may have some basis for judging whether it is material as to what was testified to in this suit. I object to going into the testimony in the suit first without some indication that there is some materiality.

THE COURT: What is the materiality of going into the suit?

MR. BALL: I am going to lay the groundwork to use his testimony in this suit.

MR. WRIGHT: The groundwork has to be laid by fact questions.

THE COURT: Mr. Ball, wait a minute.

MR. BALL: I am a little premature.

The point here is that I probably have a sequence of questions

9178 ahead, and I will withdraw that one and ask another one.

THE COURT: All right.

BY MR. BALL:

Q. Mr. Riss, I submit to you that since your resignation as president in 1945, you have been engaged only part time in the operation of Riss & Company, have spent no time in the details of the business or its active management until you resumed the presidency in 1957; is that correct?

A. That is absolutely not correct.

Q. You remember testifying, under questioning by your attorney, Mr. Gage, in the quo warranto proceeding before the Commissioner of the Supreme Court of Missouri, and your testimony was on April 8, 1957; is that correct?

A. I do remember testifying, yes, sir.

Q. I ask you whether or not the following questions were asked and answers were given.

MR. WRIGHT: May we have a reference here to the page?

THE COURT: What is the page?

MR. WRIGHT: He is apparently reading from the transcript.

MR. BALL: Transcript 1048-1049. It is Volume 8 of the transcript. I have the volume here, if you wish to see it, Mr. Wright.

9179 BY MR. BALL:

Q. Question by Mr. Gage -- Mr. Gage was your attorney; is that correct?

A. Yes, sir.

Q. "Question: Mr. Riss, during this period, we will say, from 1932 on, were you the president of Riss & Company, Inc., and in active charge of the management of its business?

"Answer: I was up to the period of about -- I think about 1946 or 1947. I was not as active as I was before, from that time on.

"Question: It has been in evidence here that your son is the president of Riss & Company, your son, Robert B. Riss, and I believe he testified that he became president of the company in 1951.

"Answer: Either '50 or '51 he became president.

"Question: Since then, as far as your active management of the business of the company is concerned in comparison with that which existed prior thereto, what occurred as to your participation in the details of company management and operation?

9180 "Answer: I just didn't participate too much in the operation of Riss & Company --"

A. In the detailed operation, that is right.

Q. No, sir, the words are, "in the operation of Riss & Company."

A. I was answering his question about detailed operation.

THE COURT: Just a minute. Wait a minute.

MR. WRIGHT: The question was read. The answer was read. There is no point in Mr. Ball arguing with the witness over what the meaning was. It is perfectly clear on its face. This is sheer argument.

THE COURT: Wait a minute.

MR. BALL: I have not even finished the reading.

THE COURT: He asked him if he was not asked a certain question and didn't give a certain answer.

MR. BALL: That is right.

MR. WRIGHT: And he said he did.

MR. BALL: I haven't even completed it.

MR. WRIGHT: The rest is argument.

THE COURT: I want to know what the materiality of this is, first, Mr. Ball.

MR. BALL: May I complete the reading of his testimony?

THE COURT: All right.

9181 BY MR. BALL:

"Answer: I just didn't participate too much in the operation of Riss & Company. My son is very capable and we have a very fine organization, so I just didn't pay as much attention to Riss & Company as I had in the past."

Then I ask you if in the same testimony you did not testify -- transcript 1114 -- as follows, with the following questions and answers, question by Mr. Gage:

"And as far as my connection with and knowledge of this controversy with regard to licensing, do you know whether or not I was at any time consulted about or had any knowledge of it. . . ." --

Mr. Gage speaking about whether he was consulted about it.

". . . prior to the filing of this quo warranto proceeding?"

And you gave the following answer:

"Well, Mr. Gage, as far as I know, I don't think you were. I was never told that you were. As I say, I wasn't paying too much attention to the details of the company, and I never heard of you being asked for an opinion. It could be. You would know that

9182 better than I. I just don't know."

Mr. Riss, were those questions asked and were those answers given?

A. Yes, sir, and I would answer the same way if you asked them again today.

Q. Now, Mr. Riss, from 1944 through 1950, you were president of the Transport Manufacturing & Equipment Company?

A. Correct.

Q. In '51, you became chairman for a year? A. Yes, sir.

Q. In '52 and '53, you were not an officer, but remained as a director; is that correct? A. Correct.

Q. In '54, you became secretary and treasurer of the Transport Manufacturing & Equipment Company?

A. Could be.

Q. In '55, you again became president and remained so until today; is that correct? A. Correct.

Q. Now, in your activities with Transport Manufacturing & Equipment Company, you supervised the work of the construction division, did you not?

A. Oh, no. I had a man that handled the construction division.

9183 Q. What was the man's name?

A. I had a man by the name of Yarrington, one of them named Yarrington.

Q. Well now, you became, on April 27, 1955, president of the Yarrington Construction Company; didn't you?

A. That is when I had to take them over, yes.

Q. And that was the time that you had a construction division in T. M. & E.; wasn't it?

A. Prior to that time. Prior to that time, we had a construction division. T. M. & E., had lent them some money, and I had to take over the company. And I took over the presidency of the Yarrington Construction Company for a short time, and then liquidated it.

Q. Now, I submit to you, Mr. Riss, that in 1953, you engaged and supervised the construction work at the Parkbill project in the name of the Transport Manufacturing & Equipment Company, that later, you subcontracted that work to Yarrington Construction Company, and then you resumed the work in the name of the Transport Manufacturing & Equipment Company, and yourself did actively supervise that work.

A. Absolutely not. I didn't spend an hour a day out there.

MR. WRIGHT: If the Court please, I don't understand what possible materiality this cross-examination can have.

9184 THE COURT: Do you object?

MR. WRIGHT: I do object.

THE COURT: All right, on that point, I will sustain the objection.

MR. WRIGHT: I request he be asked to state the purpose.

MR. BALL: May I state the purpose?

THE COURT: Yes.

MR. BALL: It is our contention that there are several reasons, a good many reasons for the financial history of what has happened to Riss & Company. One is that Mr. Riss was president, and it was an unsuccessful company; that they brought Mr. George Powell into this company, and it succeeded. They turned the business over to his son, and George Powell left, and from that time, it went on down hill.

THE COURT: What you are trying to do, I take it, is to try to convince the jury or show the jury the cause of the business going down didn't result from this alleged conspiracy, it resulted from poor management.

MR. BALL: That is one of the reasons, yes, sir.

THE COURT: One of the reasons.

MR. BALL: These things are pertinent.

THE COURT: That is a question for the jury to decide, from
9185 all the evidence, the cause of any decrease in value of the business, if you find anything like that happened.

* * *

9186 All right, Mr. Ball.

MR. BALL: Mr. Riss said the representation on the income tax returns that he only spent part time was untrue. I am now going to show the other activities to show it was true that he was only part time on Riss & Company.

THE COURT: All right, proceed.

BY MR. BALL:

Q. Now, you were a member, were you not, of R. R. Riss, et al., a joint venture engaged in oil operations?

A. Yes, sir.

Q. You were a member of Riss-Powell Syndicate, an operator of oil companies, were you not?

A. That is the same thing. That was one and the same.

9187 Q. How does it happen that there are two transactions on the books of Riss & Company of buying these properties from them?

A. One of them was a case of where Mr. Powell, when he was president of our company, I took him in on an oil venture that I had. I had never seen the oil venture, never spent one minute at the oil venture in my life.

Q. There was, however, one venture called R. R. Riss, et al., a joint venture, engaged in oil; and there was another one, a Riss-Powell Syndicate, engaged in oil operations; was there not?

A. If I remember correctly, the R. R. Riss bought out the one where Powell was engaged, when he left our company in '52.

Q. Is that your testimony, Mr. Riss?

A. That is the best of my memory at this time.

Q. I submit to you, sir, that Riss & Company bought both, in different transactions, the interests of R.R. Riss, et al., a joint venture, and the Riss-Powell Syndicate in oil properties and bought them as separate transactions. Do you disagree with that?

A. No, sir, they did buy them as separate transactions, but I am just trying to think of any oil deal that I had by myself, and I don't recall any oil deals that I had that Mr. Powell wasn't in on up to '52.

9188 Q. And after '52, you were, outside of Riss & Company, engaged in certain oil ventures?

A. Yes, sir, and still am.

Q. Yes, sir. You have been since 1940, the operator of a farm; have you not?

A. A farm?

Q. Yes, a 43-acre farm?

A. It is right in the city limits of Kansas City. The only thing I raise out there is fish; I have a pond.

Q. There have been sheep on that farm?

A. There are some sheep out there to mow the grass. To keep the grass mowed.

Q. You have also been the operator of a ranch in Colorado, have you not?

A. Just bought it a couple of years ago.

Q. You also, on May 31, 1955, became Chairman of the Board of Niles & Moses Cigar Company?

A. That is one of the six.

Q. Well, you were active in the management of the six tobacco companies?

A. I want to say to you that I have been Chairman of that for five years and have been in the office once in the five years.

Q. Beginning on April 1, 1953, you were partner in the Riss Lake Project, a partnership, with one K. McAuliff, engaged in building an artificial lake and selling off property; is that correct?

9189 A. That is correct. I spent no time in that, either, because there were no lots sold.

MR. BALL: I move to strike the volunteered statement.

THE COURT: One of the things you want to show is how much time he spent?

MR. BALL: As much time, and if the witness is going to volunteer, I am going to have to get the documents out in each one to show that he did.

THE WITNESS: I still say that I didn't spend any time on them. I am not going to say I did to help his case along.

THE COURT: Just try to answer the question.

THE WITNESS: I didn't spend any time on the project.

MR. BALL: I move to strike the answer. It was not responsive to the question.

THE COURT: What was the question? Repeat the question.

BY MR. BALL:

Q. The question is: You have been a partner in this project since April 1, 1953?

THE COURT: Answer yes, or no.

9190 THE WITNESS: Yes, I have been a partner, was a partner.

THE COURT: That is the answer.

THE WITNESS: That isn't what he asked me.

THE COURT: On redirect, if your counsel wants to ask you how much time you spent, he may ask you.

BY MR. BALL:

Q. You were also an officer of Astro-Broadway Holding Corporation; were you not?

A. That is in New York City, yes.

Q. You were also a partner in a partnership known as Klein, Rappaport & Riss; were you not?

A. That was all the same thing.

Q. Now, in 1954, you went to Canada before the first of June, returned finally about September 15, 1954, and stayed in Canada about 45 years out of the summer; did you not?

A. Forty-five years?

Q. Forty-five days out of the summer?

A. No, sir; never been to Canada over ten days in my life at one time.

Q. Now, on September 20, 1954, your deposition was taken in a case called Transport Manufacturing & Equipment Company vs. J. R. Taylor; was it not?

A. J. R. who?

9191 Q. J. R. Taylor?

A. Yes.

Q. Now, I ask you, Mr. Riss, that on the occasion of your deposition on September 20, 1954, if you were not asked the following questions and gave the following answers.

MR. BALL: This is on pages 122-123 of the transcript of that deposition.

BY MR. BALL:

"Question: Mr. Riss, you have been outside of the United States for a substantial part of the summer just past, have you not?

"Answer: Yes, sir.

"Question: Where were you during that period?

"Answer: Canada.

"Question: And when did you leave to go up to Canada [illegible] for the first time?

"Answer: I think about the third week in May.

"Question: Do you recall the exact date?

"Answer: No.

"Question: It was certainly prior to the first of June, though, would you say that?

"Answer: Yes, sir.

"Question: No question in your mind about that?

9192 "Answer: No. I know it was prior to the first of June.

"Question: And between that date and your return, which I think was about the 15th of this month, was it not, the 15th of September?

"Answer: Well, I made several trips up there and back.

"Question: Were you in Kansas City during any part of that period?

"Answer: Yes, sir.

"Question: How many times did you come back to Kansas City during that time?

"Answer: Oh, I don't know.

"Question: Well, how many would you say?

"Answer: Oh, I don't know. I would say several. I made five or six trips to Canada during the summer months."

Were those questions asked and answers given?

A. Isn't that exactly what I just told you?

THE COURT: Just answer.

THE WITNESS: Yes, yes, that is exactly what I said.

BY MR. BALL:

Q. And in that same deposition, wasn't the following question asked and the following answer given?

9193 "Question: Now, you were in the United States during a substantial part of the summer, though, as well as being in Canada?

"Answer: No, I would say I was in the United States a

portion of the summer, but I would say maybe, oh, let me see, I spent, I probably spent 45 days in Canada. I am just guessing, but I probably spent 45 days in Canada out of the summer." That question was asked and that answer was given?

A. I said I went up there four or five times and stayed a week or ten days at a time. That would be 45 days.

Q. Well now, the question again: Were those questions asked and answers given? A. Yes.

MR. BALL: Your Honor, this is delaying this examination, when we get these volunteered statements.

THE COURT: All right, let's proceed now. He said he answered those questions.

BY MR. BALL:

Q. Now, in 1955, you took a trip to Cuba and Puerto Rico; did you not?

9194 A. Yes, sir.

Q. And Riss & Company paid hotel expenses for your benefit in Cuba and Puerto Rico in the amount of $2,623; did they not?

A. I went down there on a business trip, and whatever the expenses was, they paid it. I don't know how much it was.

Q. How long was the trip?

A. About a week.

THE COURT: What year was this?

MR. BALL: 1955.

THE WITNESS: About a week.

THE COURT: All right.

BY MR. BALL:

Q. In 1956, you went to Europe in February, did you not?

A. Yes, sir.

Q. You returned toward the end of May; isn't that correct?

A. Yes, sir.

Q. In the year 1957, you were up in Canada pretty much of the year; weren't you? A. No, sir.

Q. Now, your testimony was taken just a few days ago, April 11, 1960, in a case between Transport Manufacturing & Equipment Company and Fruehauf Trailer Company; isn't that correct? A. Yes, sir.

9195 Q. Weren't the following questions asked and the following answers given by you:

"Question: And I show you the acknowledgement of your signature, which says that you appeared before Mr. McClary and acknowledged your signature on the 15th day of July, 1957. Would you say that you executed Exhibit 28 on or about the date it bears?

"Answer: Well, if that date says that. It says July 15th.

"Question: Why the delay between June 19th when you received that mortgage and signing it on July 15th? Why did you delay from June 19th to July 15th in signing it?

"Answer: It could be, Mr. Brown, that I was out of the city. I don't wait here just for a mortgage to come in. You say the 19th or 15th?

"Question: Yes, sir.

"Answer: Chances are -- I told you I was out of the country pretty much. I was up in Canada pretty much of the year of '57, in the summer."

9196 Were those questions asked and those answers given?

A. That is right; and I say, when I was up there pretty much --

MR. BALL: Will the Court please --

THE COURT: He wants to know --

THE WITNESS: Yes, sure, if it says so in the deposition.

* * *

9258 Q. I am now going to have Mr. Flynn write down June 25, 1950. "Outbreak of Hostilities in Korea."

Now, the immediate effect of the outbreak of hostilities was a very rapid and heavy growth of explosives traffic, was that not right?

A. Yes.

MR. BALL: If the Court will find out if that is still where the jury can see it--

MR. RHOADS: May we have the number of that chart?

(Chart headed "1950 Outbreak of Hostilities in Korea" marked AWR 68 for identification.)

MR. BALL: I have had Mr. Flynn place on the easel what has been marked as AWR exhibit 68 for identification which is headed "Riss & Company Revenue from Explosives."

BY MR. BALL:

Q. Now that, as I understand it, corresponds to the figures that appear on the exhibits which the plaintiff has already introduced.

9259 I think it is plaintiff's exhibit 214. Now, in 1949, Mr. Riss, the amount of this revenue from explosives that Riss & Company had was about three per cent of its total revenue, right?

A. Three per cent?

Q. About.

A. I do not know. If that is the figures. I know how many pounds it was.

Q. Your total revenues were a little over $13 million, were they not?

A. Yes, sir.

Q. Then the explosives business had the beginning of hostilities and nearly, not quite, doubled its volume in 1950?

A. $651,000 out of the $13 million. That is more than three per cent.

Q. Which years?

A. I am looking at 1949. Is that what you are talking about?

Q. May I look at this chart?

A. These are some figures I put on there showing the amount

of money for the explosives and the amount of money for the total.

Q. If you will look at plaintiff's exhibit 214, it shows that the
9260 total revenues were $13,739,000, and that the revenues from explosives were $395,079; isn't that correct?

A. That is correct, $395,079.

Q. Then in 1953, of your total revenues of $29 million -- $29,100,000, $11,400,000 were from explosives, is that correct?

A. That is correct.

Q. That is approximately 40 per cent of your total revenues then were from explosives in 1953, is that correct?

A. Something less than 40 per cent, but that is close.

Q. Now, with the outbreak of hostilities there was also an increase in government business in non-explosives commodities, right?

A. In government business?

Q. Yes.

A. Oh, I think to some extent, but not very much.

Q. Now, Mr. Riss, in order to handle the explosives business, it was necessary for you to have equipment available when the government wanted the shipment carried, was it not?

A. Naturally.

Q. In order to accomplish that purpose, it was necessary at times to take the equipment away from your general commodities business and make it available to handle explosives business?

9161 A. Seldom if ever. Only in emergencies.

Q. As a matter of fact, I submit to you that to handle the explosives business, on many occasions that it took most of the equipment you had available?

A. That is not true.

Q. Mr. Riss, you gave testimony in a case entitled "The State of Missouri vs. Riss & Company" on April 8, 1957, did you not?

A. Yes, sir.

Q. And I ask you if the following questions were not asked and the following answers given - the questioner being Mr. Gage, your attorney. This is transcript page 1069.

QUESTION BY MR. GAGE:

"Q. Now, you said that during these years you have mentioned, 1951, 1952 and 1953, a high per cent of the upgraded mileage of the company was involved in hauling explosives?

"A. Explosives and other items for the Government.

"Q. And other government items?

"A. Yes.

9262 "Q. And why did that affect your regular run of commercial business?

"A. Well, it took most of the equipment that we had available; I won't say 'most of it,' a good portion of it; and when the Korean War was over explosives and other items stopped being shipped, our business fell down, fell off considerably, and it took a considerable amount of money to get out and work all the places for commercial freight. Commercial freight, of course, is not as profitable as the specialized field."

Now, those questions were asked and those answers given, were they not?

A. And I would answer the same questions the same way right now. But we had two divisions in the government--may I answer?

THE COURT: No, he wanted to know if those questions were asked and whether you gave the answers?

THE WITNESS: Yes, sir. Yes, I did.

MR. BALL: May the other part of the answer be stricken?

THE COURT: Very well. It may be stricken.

* * *

* * *

9376 Q. Now, Mr. Riss, you were aware, were you not, that in each of the years 1955, '56 and '57, that there were successive decreases in the
9377 tonnage of Government explosives which were shipped in this country by the Department of Defense?

A. Yes. After the Korean War there was a general decline in the shipment of explosives.

* * *

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9425 CROSS EXAMINATION OF MR. RISS

BY MR. BALL:

Q. Now, I have listed in the chart identified as AWR 138, the officers of Riss & Company as shown on schedule 9002-C. Mr. Flynn, I think when I said at the end of 1952, some of these gentlemen left during 1952, so that technically is not correct.

A. I do not know who you are talking about.

(AWR No. 138, chart Personnel officers schedule 9002-C 1952, marked for identification.)

BY MR. BALL:

Q. Is this one you cannot see from here?

A. I cannot see it very well.

THE COURT: Do you want to go down and look at it?

BY MR. BALL:

Q. These are the officers named in schedule 9002-C for the year 1952. Now, I take it that Mr. Powell left during 1952, right? A. Yes.

9426 Q. Mr. Powell, Jr., left in 1952? A. Yes.

Q. Now, we will change that to "From the end of 1952" to "during 1952."

(The chart was thus changed.)

BY MR. BALL:

Q. Now, during 1952, R. R. Riss is listed as Chairman. You are still chairman and also president, right? A. Yes.

Q. Mr. G. E. Powell is listed as vice chairman. He is no longer with Riss & Co., right?

A. That is correct.

MR. BALL: Will you check that off of the chart?

BY MR. BALL:

Q. Mr. R. B. Riss as president in 1952--

A. Now vice chairman.

Q. He is now vice chairman. We will leave that. Mr. W. C.

Dannevik is listed as executive vice president. He is no longer with the company?

A. That is correct.

Q. Mr. M. D. Robeson is listed as vice president. He is no longer with the company?

9427 A. Correct.

Q. Mr. D. C. Stone is listed as vice president. He is no longer with the company?

A. He is retired. He is in an advisory capacity.

Q. Mr. L. Quinn, also retired? A. Dead.

Q. Mr. E. E. Pick, still remains as vice president, does he not? A. Yes.

Q. Mr. L. L. Stearns was listed as vice president and he is no longer with Riss & Co.

A. He has been gone quite a while.

Q. Mr. C. H. Rhodebeck is listed as vice president. He is no longer with the company?

A. He left last year.

Q. Mr. M. P. Hester listed as vice president, no longer with the company?

A. He has been gone a couple of years.

Q. Mr. Neugebauer is listed as vice president.

A. He was terminal manager in Baltimore. He is gone now. Been gone several years.

Q. Mr. E. E. Strohfield, listed as vice president, now in semi-retirement. A. Yes.

Q. Put a circle, rather than a cross.

9428 A. He had a heart attack and now works only part-time.

Q. Mr. R. E. Young listed as vice president and no longer with Riss & Company.

A. No, he is not with us.

Q. R. E. Martin is listed as vice president. No longer with you?

A. No.

Q. Mr. Nahrgang listed as vice president. He is still with you?

A. In charge of the entire east.

Q. Mr. G. E. Powell, secretary and treasurer is no longer with you? A. Who?

Q. Powell, Jr.

A. No, he left, too.

Q. Mr. S. W. Bell, assistant treasurer is now the treasurer of the company? A. Yes.

Q. D. L. McMorris, comptroller, no longer with the company. A. No, sir.

Q. J. F. Miller, assistant to the president; no longer with you?

A. He was an attorney.

9429 Q. Now, no longer with you?

A. No, he was only there about a year. Might I add, Mr. Ball, we were--

Q. Now, I object.

THE COURT: No, no.

THE WITNESS: All right.

THE COURT: Proceed.

BY MR. BALL:

Q. In 1951 then Mr. S. A. Johnson, a vice president, died. Mr. Shelley and Mr. Gratz, vice presidents, left your employment in 1951.

A. Mr. Gratz was only there for a short time, Mr. Ball. He was there for less than a year.

Q. In 1952 Mr. Powell and Mr. Hester and George E. Powell, Jr., left? A. Yes.

Q. In 1953 Mr. D. C. Stone retired and Mr. Robeson left. A. Yes.

Q. 1954 Mr. Stearns and Mr. McMorris left? A. Yes, sir.

Q. Now, you have had some other changes in personnel. You had a Mr. Carlos Romolo who was the Washington representative, no longer with

the company?

A. He was a salesman. He was stationed in Washington.

9430 Q. You had an attorney by the name of Marie Waltner no longer with the company?

A. She was with us up until just a short time ago.

Q. Mr. J. A. Reardon was a government division supervisor, later assistant to the Vice President, right, and no longer with you?

A. Correct, when we closed the government division, he left.

Q. Mr. C. Tenuto was director of maintenance in 1954 and left shortly thereafter, did he not?

A. He was there only a short time.

Q. Mr. McClary was Equipment Supervisor in 1954 and left in 1956, did he not? A. Correct.

Q. Mr. C. C. Seashore was listed in the 1955 report as a supervisor. He was the man you hired to put a safety program in Riss & Company?

A. Yes.

Q. He left you when, in the end of 1955?

A. I do not recall just what time that he completed the work. I just do not recall.

Q. You mentioned Mr. Donald Sable in connection with Yellow Transit. He joined Riss & Company as sales manager in 1949 and was appointed regional sales manager in 1952 and left about 1954, did he not?

9431 A. I do not recall the year he left, Mr. Ball. It was our policy to give the boys titles and to call on customers.

Q. A Mr. Van Cleave was in charge of your ICC work for a while, was he not?

A. He handled the matters pertaining to the Interstate Commerce Commission and other things.

Q. And Mr. W. O. Richardson was freight claim agent but was a member of your operating committee at one time, right?

A. Oh, yes. I think he was on the Operating Committee and

discussed claims. He was head of our Claims Department really is what his job was.

Q. No longer with you? A. Yes, he is.

Q. What capacity?

A. The same job.

Q. Your terminal manager at Denver, in 1956 was a Mr. Hess. In fact, his name came up in connection with some prior testimony. He is no longer with the company?

A. He had to leave on account of his wife's illness.

* * *

9529 Q. You have a sister by the name of Lena Riss?

A. I certainly do.

9530 Q. And she has certain trailers in her name which she was renting to Riss & Company, was she not?

A. Yes, sir. she bought them from T. M. & E. and paid T. M. & E. a profit for them when she bought them.

Q. When you sold trailers back to the Fruehauf Trailer Company, the deal included, with the capital gain, a profit to Lena Riss, did it not?

A. It included profit to Lena Riss. It included profit to several other people and companies, because the equipment was sold at a great advantage, because of the piggyback and the market on used equipment on the way up.

Yes, she made a profit on them, but it was her equipment and had nothing to do with Riss & Company or T. M. & E.

Q. And this was equipment originally purchased by T. M. & E. for the use of or lease to Riss & Company, was it not?

A. Yes, but she had owned it for two or three years and she paid--

THE COURT: One at a time, please.

THE WITNESS: She had owned it for two or three years, and she paid the same rent -- Riss & Company paid her the same rent that they paid T. M. & E.

* * *

REDIRECT EXAMINATION OF MR. RISS

BY MR. WRIGHT:

* * *

9740 MR. WRIGHT: I would be happy to stipulate here and have the stipulation read to the jury, that these claims I am referring to were withdrawn in the Fruehauf case on the advice of counsel for Mr. Riss in this case.

THE COURT: You did advise him to withdraw them.

MR. WRIGHT: Yes. I say, I would be happy to stipulate that fact and have the jury fully aware of the fact that that withdrawal was made -- that we did advise Mr. Riss to withdraw those claims, and he withdrew them.

* * *

REDIRECT EXAMINATION OF MR. RISS (RESUMED)

BY MR. WRIGHT:

9747 Q. Mr. Riss, you recall when you were being cross examined by Mr. McGlothlin, he drew your attention to an amended and supplemental counter claim that was filed in the Fruehauf case? A. Yes, I do.

Q. And wrote some figures upon the board there as to the claims made on account of damage to goodwill? A. Yes, sir.

Q. You recall that, on account of the damage in the way of lost profits? A. Yes, sir.

Q. When that case went to trial before Judge Ridge, did Riss & Company make any claim or present to him any claim for any of the damage represented by those counter claim figures?

A. No, we did not.

* * *

DIRECT EXAMINATION OF MR. MEYERS

BY MR. WRIGHT:

* * *

9781 Q. Will you state your full name and address, please?

A. My name is Robert M. Meyers, M-e-y-e-r-s.

Q. Where do you live?

A. 95 North Main Street, in Cranbury, New Jersey.

Q. What is your occupation?

A. Executive Vice President of Management Planning, Inc., located 192 Nassau Street, Princeton, New Jersey.

Q. How long have you held that position?

A. Since 1958.

Q. And how long have you been with the Management Planning Organization?

A. Well, with the Management Planning Organization since 1946.

Q. And prior to that what were you doing?

A. Well, just prior to that, then I was in the Navy during World War II, where I was in the Supply Corps as a Lieutenant.

9782 Q. And before that?

A. Prior to that time I was with the firm of Fiduciary Council, Incorporated, located at 40 Wall Street, New York City.

Q. What was the nature of that business?

A. They are an investment advisory firm rendering investment advice to institutions and to individuals.

Q. And what was the work you did for them?

A. With them I was an account manager and financial analyst.

Q. And that was during what period of time?

A. From 1938 to 1942.

Q. And prior to that you were in college?

A. Yes, sir.

Q. What college did you graduate from?

A. Harvard College in 1938.

Q. Can you tell us briefly what Management Planning, Inc. does?

A. Management Planning renders financial advice to industry, but specializing in valuation of closely held companies.

Q. What do you mean by "closely-held companies"?

A. A closely held company is a company whose stock is owned

by one or two stockholders. A company thus whose market or whose stock is not publicly-held.

9783 Q. What is the purpose of the kind of evaluations that Management Planning, Inc. makes of those closely-held companies?

A. The purpose in each instance revolves around the fact that the owners of the stock do not know just what the value of that stock is. For example, anyone knows what the value of a share of General Motors Stock is, because it is publicly traded, and you know in any given time what the going price for the stock is. But in the case of a closely held company where there are not active and frequent trades in that stock, there is no such market. And so, evaluations of closely-held companies are prepared so that the owners of stock may know what the value of the stock is.

Now, the occasions which arise which require a valuation are numerous. For example, if a company wishes to establish a stock purchase plan for its employes, the problem arises as to the price at which the stock will be offered to the employees for purchase.

Another purpose is when a company is considering public financing, by that I mean, offering its stock to the public, when that instance arises, the question comes to the mind of Management, "Well, if we were to do this, about what price would they obtain for this stock?"

9784 And so, we prepare a valuation to indicate the answer to that.

Another purpose is this: If the owner of stock in a closely-held company wishes to make a gift of some of that stock, he must file a gift tax return which states the value of the gift he makes.

Since it is closely-held, the question arises "Well, what is the value of this gift of stock that he wishes to make?"

So, we prepare a valuation to indicate what that value is.

Q. Can you give us the names of some of the companies that Management Planning, Inc., has evaluated?

A. Yes, sir, we prepared valuations for the Inland Container Corporation, in Indianapolis. This company is a manufacturer of corrugated

containers.

The Indiana Gear Works, again in Indianapolis, a manufacturer of gears.

The Steel Improvement and Forge Company, in Cleveland, Ohio, a manufacturer of forgings principally for aircraft use.

The E & L Transport Company, a trucking firm, in Dearborn, Michigan.

Lyons Transportation, a trucking firm in Erie, Pennsylvania.

9785 Q. Now, was Management Planning retained by Riss & Company to make a valuation study of its business for the purposes of this case?

A. Yes, sir.

Q. By the way, who was the president of Management Planning, Inc.?

A. The president is Mr. Paul E. Orr, Jr.

Q. And there is a Mr. Weed associated with the company, too?

A. Yes, sir.

Q. What is his capacity?

A. He is Senior Vice President.

Q. Now, when the Management Planning was obtained to make this study for the purpose of this case, do you recall who was put in charge of it?

A. Mr. Weed, W-e-e-d.

Q. And, did you, also work with him on it? A. Yes, sir.

Q. You are thoroughly familiar with it, are you? A. Yes, sir.

Q. And you can tell us what the values for Riss & Company were that you were asked to ascertain?

A. We were asked to ascertain two different values. One was the going concern value of Riss & Company as actually it existed as of January 31, 1958: The second one was what the value of Riss & Company would have been on January 31, 1958 if it had followed the trend of its industry.

9786 Q. The trucking industry?

A. Yes, sir.

* * *

9792 Q. Did you have prepared, Mr. Meyers--when I say "you," I mean Management Planning, Inc. -- have prepared this chart that is on the easel there? That is what, 200 and what? I cannot read the number? A. 246.

Q. --246 for identification. A. Yes, sir.

Q. Just tell us what the figures are you have got on that chart and where they came from?

A. The figures on this chart came from the annual reports to the Interstate Commerce Commission submitted by Riss & Company. In this column here there are shown the operating revenues of Riss & Company. They are shown with the three zeros.

* * *

9794 Q. I just want to get a description of what you did and what you put on these various charts that you assembled. That first one I think you said has the operating revenues of Riss & Company as they appear in its form A report for the period 1949 through 1957, is that right, the first column? A. Yes, sir.

Q. Then what is the heading on the next column?

A. The heading on this column is "Net Income Before Taxes."

Q. Where did you get the figures you have there?

A. Taken from the annual reports of Riss & Company to the Interstate Commerce Commission, but there have been adjustments made to the net income before tax for the years 1954 through 1957.

Q. Just tell us what those adjustments were that you made?

A. In 1956, Riss & Company received a maintenance credit amounting to $650,000 which was a substantial amount and abnormal in

9795 nature and amount, and that maintenance credit actually was applicable to the years 1954 and 1955, even though received in 1956: And so, the net income of Riss for 1954 and 1955 had been adjusted for that maintenance credit received in 1956.

Q. Just how did you make the adjustment? When you say you adjusted it, what did you do?

A. The maintenance credit of $650,000 was used to increase the earnings. Actually that meant to reduce deficit that the company did report in 1954 and 1955.

Q. Well, now, what was the amount of the increase with respect to each of those years that the adjustment was made?

A. In 1954 of $180,000; 1955, $470,000.

Q. And then there was an according reduction, was there, for the year of 1956 that was taken in?

A. That is correct, sir. Then we made one further adjustment, that being in 1957, when Riss & Company received $2,215,244; and another item of $453,652. These items were extraordinary in amounts and extraordinary--and abnormal in nature, and the earnings of 1957 were adjusted for them.

By that I mean that the actual earnings as shown in 1957 were reduced by this extraordinary income items in 1957.

9796 Q. In other words, you took--just give me an example. What is the figure that appeared on the Form A report as compared with what you have got on there now after your adjustment?

A. Well, sir, approximately the form showed, before adjustment, earnings of about $1,600,000. After deducting these total adjustments of about $2,600,000, we show adjusted income for 1957 of a loss of $1,076,000.

Q. Now, the figures, you have them there -- as you have them -- strike that.

The purpose of these adjustments, I take it, was to make the net income more nearly correspond to the actual operating results of the company, was that it?

MR. GATES: Object. Leading and suggestive.

THE COURT: Ask him the purpose.

BY MR. WRIGHT:

Q. What was the purpose?

A. The purpose was to show what the actual operations of Riss & Company were generating in the way of earnings, or in this instance, losses.

Q. And you have there on your chart the last four years, they are all loss years, are they?

A. That is correct.

Q. Now, what was the next thing you did after you prepared that table? Did you make a chart showing the trend there? A. Yes, sir.

9797 Q. I will show you these graphs that have been marked for identification Plaintiff's exhibit 247, operating revenues and net income before taxes of Riss & Company, 1949 to 1957, and ask you to tell us what that shows.

A. Well--

MR. GATES: Now, may it please the Court, again I would like to have Mr. Wright, if he would, be good enough to identify these two charts which are marked as exhibit 247 for identification, so it comports with the study which has been furnished to us and to your Honor.

THE WITNESS: I think I may be able to help on that, Mr. Gates.

THE COURT: Suppose you do that.

(Two charts, "Operating Revenues and net income before Taxes, of Riss & Company, 1949-1957" are marked Plaintiff's exhibit 247 for identification.)

THE WITNESS: All right.

I think, sir, if you will look at the upper portion--no, at your chart 1, and also your chart No. 2, we, essentially have this same data for Riss, although in this instance it is on a dollar basis instead of an index

9798 basis on those two charts.

BY MR. WRIGHT:

Q. Just tell us how that chart was constructed?

A. Along this axis we have measured the size of operating revenues

in millions of dollars for Riss & Company, and in this direction the years 1949 through 1957--and we have simply plotted on this chart the trend of the operating revenues of Riss & Company.

Q. Do you have a point on there for each year represented by the dollar figures you had on that preceding table?

A. That is correct, sir.

Q. And you begin the first year, that covers the same period 1949 through 1957? A. Yes, sir.

Q. And that top one, those are the gross operating revenues, are they? A. Yes, sir.

Q. All right, then. Explain what the second one is.

A. The lower portion is the same essential kind of chart except it is showing net income before taxes. On this scale here we have plotted the size of the net income in this in millions of dollars. This is a zero line, so anything above it means plus earnings, I mean earnings, or below 9799 it means losses.

Again, it is shown on this axis for the years 1949 through 1957, and we have plotted the data shown on the exhibit we were just referring to on this chart.

Q. Now, then--

MR. McGLOTHLIN: May I ask a question to clarify something?

THE COURT: Surely.

MR. McGLOTHLIN: Did he state if it is the net income or adjusted?

THE WITNESS: Adjusted net income as we have shown it on the exhibit we were just discussing.

MR. McGLOTHLIN: Thank you.

THE COURT: All right.

BY MR. WRIGHT:

Q. Now, did you then also prepare this 248 for identification, the Riss & Company balance sheet as of December 31, 1957? A. Yes, sir.

(Chart of Riss & Co. balance sheet as of 12-31-57 is marked Plaintiff's Exhibit 248 for identification.)

BY MR. WRIGHT:

Q. What are the figures--where do the figures you have there come from?

9800 A. These figures came from the annual report of Riss & Company to the Interstate Commerce Commission, with the one exception, that we have mathematically derived on this table the net worth of Riss & Company. That net worth does not appear on the ICC statement, per se. But we have arithmetically arrived at it.

MR. SHEA: I wondered whether the witness would once again indicate to us where this is to be found.

THE COURT: Will you do that?

THE WITNESS: That is Table No. 8 in the report that you have, sir.

THE COURT: Table No. what?

THE WITNESS: No. 8.

THE COURT: Eight?

THE WITNESS: Yes, sir.

BY MR. WRIGHT:

Q. You said you arithmetically derived a deficit figure there. Will you just explain how that calculation was made? What was the arithmetic?

A. The balance sheet of Riss & Company shows that it had the total assets on December 31, 1957 of $1,661,000.

It shows, too, that it had current liabilities of $1,315,000: Advances payable of $115,000.

9801 Deferred credits of $200,000, and Reserves for, I believe, losses, insurance claims of $74,000.

These liabilities total $1,704,000, as shown here. So that figure of $1,704,000, the liabilities, actually exceed the total assets of the company.

The difference, the extent to which the liabilities exceed the total assets represents the negative net worth of this company. We have shown this at $44,000.

Arithmetically this will come out by $1,000, and that is simply by rounding the figures as these figures are shown in rounded thousands. So, thusly, we have computed the negative net worth of Riss & Company as $44,000.

Q. Now, having made these computations, did you then endeavor to arrive at a value for Riss & Company as a going business on January 31, 1958?

A. Yes, sir, we did.

Q. And what was the value which you arrived at?

A. Well, sir, in view of the history of losses for four years, and in view of the negative net worth of the company at December 31, 1957, the only real attraction of Riss & Company as a going concern to an investor would be the fact that the company does control almost $1,700,000 in assets, even though those assets are exceeded by the liabilities.

9802 Under those circumstances we estimate that the maximum going concern value of Riss & Company was $500,000 on January 31, 1958.

Q. That was the figure you say as the maximum estimate?

A. Yes, sir.

Q. It could have been less? A. Yes, sir.

Q. Now, will you tell us how you went about making the valuation of Riss & Company as of January 31, 1958, as to what it would have been if it had kept pace with the trucking industry?

A. Yes, sir. Well, our first step was to obtain data concerning operating revenues of inter-city carriers of general freight, and those carriers having operating revenues of $200,000 and more.

Q. This data you are talking about you have shown on this chart that is marked exhibit 249 for identification.

A. Yes, sir, and I believe, sir, that is table 1 in the report that

you have in your hand.

(Plaintiff's exhibit 249, operating revenues of inter-city carriers of General Freight of revenues of $200,000 and more was marked for identification.)

9803 BY MR. WRIGHT:

Q. Now, those figures that you got for these intercity carriers of more than $200,000, where then, did they come from?

A. They came from the reports carried by Trinc's, which collects data concerning statistics on intercity carriers.

MR. GATES: Now, if the Court please--

MR. WRIGHT: Are you referring to this--I think we had the volume marked plaintiff exhibit 235 for identification.

I am not clear whether this is in evidence or not. It is marked here as received. It was identified and I do not think it was in evidence.

MR. GATES: Mr. Wright is correct. It is not in evidence.

Now, if the Court please, I am going to object to any testimony or any charts derived from Trinc's. They are not, the reports of Trinc's are not original source material. They are secondary reports, a compilation by a commercial agency.

In that regard, if the Court please, I refer specifically to exhibit 243 which was put in evidence by the plaintiff in this case. There are seven carriers listed there, with Riss at the top.

9804 The reports with respect to Riss contained on Exhibit 236 came from the Forms A. The figures with respect to the other six carries initially placed upon that chart came from Trinc's.

There are five years and six carriers, or thirty figures. Of the thirty figures put upon that chart, when Mr. Wright brought in the Forms A which are the reports, the original source material, 23 of the figures were in error.

Now, I submit to your Honor that an exhibit which is predicated upon a study, a commercial study, a secondary source, which has that

great margin of error is not competent evidence in any proceeding.

I object on the ground that it is not the original source material from which these tables have been prepared.

THE COURT: Well, what is Trinc's? Can you tell us something about that?

THE WITNESS: Well, sir, I believe the full name of the company is Transport Research, Inc., and one of the services it performs is to take data as submitted by trucking firms to the ICC, and collect that data and put it in a form such as is shown in this exhibit 235.

THE COURT: Plaintiff's 235?

THE WITNESS: Yes, sir.

9805 THE COURT: Have you had experience with that publication before?

THE WITNESS: Yes, sir.

THE COURT: How many times have you used it in connection with your work? Approximately.

THE WITNESS: Well, sir, at least once before this, I know.

THE COURT: You know something about it, then?

THE WITNESS: Yes, sir.

May I make this comment on this source? Unquestionably, any organization collecting a vast amount of materials such as is involved in this particular Red Book that we have here as this exhibit, will make errors. Probably errors in both directions. On the low side and on the high side. But may I say that, while this is true, to suggest that this is unreliable takes the matter out of perspective in this sense. That the data, such as is given concerning this industry in this book, is so much more complete than we normally are able to work with in dealing with other industries, that we consider ourselves, let us say, fortunate to be able to have data this good concerning the industry.

MR. GATES: Now, may it please the Court, in the prefatory comments of Trinc's, itself, it is made abundantly clear that the Red

Book--that is what it is commonly called in the industry because of its color--
9806 is not prepared from the Forms A, but rather is prepared from the quarterly reports.

THE COURT: Of the Commission?

MR. GATES: The quarterly reports prepared by the carriers and submitted to the Commission.

THE COURT: Where do they get that information?

MR. GATES: That information comes from the carriers.

THE COURT: From the carriers?

MR. GATES: That is correct. But it does not purport, if the Court please, to be a recapitulation of the Forms A. They admit that it is not.

I submit to your Honor that on that ground it is incompetent evidence in this proceeding. The Forms A are available and could have been obtained by Mr. Meyers, had he chosen to do so. But, rather, he chose to rely upon a secondary source: And in a matter as important as this, namely, the valuation of the company which goes directly to the issue of damages, it seems to us that he should be required to use the source material rather than something else.

THE COURT: Mr. Wright, do you have anything to say about it?

MR. WRIGHT: Maybe I can bring it out.

9807 BY MR. WRIGHT:

Q. How many trucking companies do you have on your study there?

A. Well, sir, in the year 1949 there the figures pertain to $894 different trucking firms. The number varies in succeeding years. By 1957 it is up to 965.

Q. Did you purport to show on any of your charts or any of your figures, or were you interested in what any particular one or group of those trucking companies had done? A. No, sir.

Q. Your study was confined entirely to a determination of what

the industry was doing, is that right?

A. That is correct, sir.

Q. Now, in your opinion is this data an adequate source to tell you what the industry was doing during that period?

A. Yes, it is.

MR. GATES: I am going to object to that question as calling for the conclusion of this witness which he is not qualified to give.

THE COURT: Well, Mr. Gates, you will be permitted to cross examine him on this point. I am going to let him testify. The weight to be given to the witness will be for the jury to determine on all of the evidence.

9808 MR. SHEA: I should like, if your Honor pleases, to object to this chart on another ground, that is, that the trend of the industry can not be relevant in this case after the admissions which have been made by Mr. Riss. In short, after the sworn statement of Mr. Riss, explaining a drop in his net worth of $4 million as a result of the wrongs that he claimed Fruehauf did him, the result of this means that the trend in the industry has no relevancy to the results that Riss had so far as there was any effort to relate the drop in net worth to any activities of the defendant.

THE COURT: I know what you have in mind. At the proper time the Court will instruct the jury on the issue of damages, and the cause of the alleged damages is going to have to be for the jury to determine under all of the evidence, if any.

MR. SHEA: Yes, mine is a specific objection to the use of trend.

THE COURT: I understand.

MR. GATES: May I be heard just one more moment on this issue, your Honor.

THE COURT: All right.

MR. GATES: Mr. Meyers has already admitted in answer to questions by Mr. Wright, that Trinc's has erred both ways, upward and

9809 downward.

I have not been able to count in the short time that I have had the figures on Plaintiff's exhibit 243, but those relate to operating revenue. I think I am correct in saying that 19 of the 23 that are wrong, overstating the operating revenues.

Now, with a picture of that kind, your Honor, I submit that it is error to permit the jury to rely upon figures taken from that kind of a study, when the Forms A are available.

THE COURT: Well, I am going to permit him to testify. All right, let us proceed.

BY MR. WRIGHT:

Q. Will you just describe briefly in general terms what the data from Trinc's is that you have got on the chart in front of you? I cannot read the number on it.

A. It is Exhibit 249. The data from Trinc's is shown in his operating revenues for intercity carriers of general freight, carriers with operating revenues of $200,000 or more.

Q. Now, that is the figures, the figures you have are the total for all of those carriers?

A. Yes, sir, for the years 1949 through 1957.

Q. And then the next column you have the number of carriers?

9810 A. Yes.

Q. That went to make up each figure? A. Yes.

Q. Just give us the high and low range there so we will know the number of carriers you are dealing with.

A. The lowest number was in 1949 and 1954 when there were 894 reported carriers. The highest number was 968 in 1955.

Q. Now, there is where the carriers, according to Trinc's, had gross revenues of more than $200,000 during those years, right? A. Yes, sir.

Q. And those figures you have on there are gross operating revenues again, is that right? A. Yes, sir.

Q. What is on the chart below there?

A. These are Riss & Company's operating revenues for the same period of years, 1949 through 1957.

Q. Those are those same cross figures that you have on the gross operating revenue figures, is that right?

A. Ordinarily, yes.

Q. Now, then, did you--

MR. WHEELER: May I ask a clarifying question?

THE COURT: All right.

9811 MR. WHEELER: I did not understand, Mr. Meyers, whether or not the carriers that are included in the upper half of that chart include specialized carriers.

THE WITNESS: I believe that they are intercity carriers of general freight, per se: And I believe that Trinc's shows separately, -I presume you are talking about something like petroleum carriers--I believe it shows those separately.

MR. WHEELER: You do not know whether or not this includes heavy haulers?

THE WITNESS: I believe heavy haulers are shown separately, too, sir.

THE COURT: All right.

BY MR. WRIGHT:

Q. In any event, you then made up a chart, did you, showing the trend of gross operating revenue of the intercity carriers as compared to Riss & Company; and this is Plaintiff's exhibit 250 I just put up here, sir.

(Plaintiff's Exhibit No. 250 is marked for identification.)

A. Yes, sir, it is. For identification is the chart No. 1 in the reports that the gentlemen have.

Q. Now, can you tell us how that chart was constructed? Tell us what it shows.

A. We had taken the figures shown on the exhibit just previously

discussed, and it appeared in index of the data for the intercity carriers and
9812 also for Riss, using the years 1949 and 1950 equal to 100. That means that all subsequent years' figures are computed as a percentage of the levels which actually existed in 1949, 1950.

This is done so that we can show the trends of these figures since 1949-1950 and those trends are plotted on this chart.

Q. Now, can you explain the plotting, what you have in the scale, what up the side is, and across, those figures there?

A. On this vertical scale, reading from bottom to top, there is shown this index base with the years 1949 to 1950 equal to 100.

Q. Where is 100 there? That is what I want to get at.

A. Well, the chart is prepared so that the one mark is at 80 and the next at 120. So, the hundred goes in between these two, this way (indicating). This is the level of 1949-1950.

Q. Did you use that same 1949-1950 base for both Riss & Company and for the industry carriers you have got on there? A. Yes, sir.

Q. And which is the heavy line?

9813 That is the Riss & Company trend, is it?

A. The solid line is Riss & Company's trend: The dotted line is the trend of the intercity carriers.

Q. That shows, you say, that chart shows what percentage, say, of the 1949-1950 business the intercity carriers were doing in 1956 or 1957, is that right?

A. That is right, sir.

Q. And it also shows the same percentage as far as Riss & Company is concerned? A. Yes, sir.

Q. Do you have those figures, can you tell us what the percentage of increase was there on the intercity carriers during the period?

A. Yes, sir, in 1957 the operating revenues of the intercity carriers were 207 per cent of their operating revenues in 1949-1950.

Q. And what percentage did Riss & Company's 1957 revenues bear to its 1949-1950 revenues?

A. 80.98 per cent. Almost 81 per cent.

Q. Then did you also make an examination of figures as to what you call profit margins?

A. Well, sir, our next--

MR. SHEA: If the Court please, may it be understood that my objection goes to each of these up to the time that I get up again. I do not want to be interrupting. But, basically, Mr. Wright has made no effort
9814 to lay what it seems to me is the required foundation for introducing any showing of the trend. The required foundation would be to show that Riss is comparable to the industry except for some activities of the defendants in this case. No effort has been made to show that Riss & Company is comparable to the industry except in that regard.

THE COURT: Your objection will go to all of this. All right.

MR. GATES: Your Honor, may I also repeat my objection with respect to this next exhibit which is Plaintiff's 251 for identification. It likewise was taken from Trinc's. I submit it is incompetent evidence in this proceeding.

THE COURT: All right. I will overrule the objection. Let us proceed.

BY MR. WRIGHT:

Q. I will show you this table marked Plaintiff's Exhibit 251 for identification. It is net income before taxes, Intercity Carriers of General Freight, Carriers with operating revenues of $200,000 or more at the top. Below that is Riss & Co. Net Income Before Taxes.

Now, will you just tell us where the data you have shown there came from, and what you have done with it.

9815 (Plaintiff's Exhibit No. 251 was marked for identification.)

A. Yes, sir.

Again, the data concerning the intercity carriers, shown in the column headed "Net Income Before Tax," is taken from Trinc's.

And it has been tabulated here for the years 1949 through 1957.

The data concerning Riss & Company is its net income before tax, adjusted as described earlier in connection with an earlier exhibit. It is exactly the same data concerning Riss & Company that we earlier discussed.

Q. Now, did you then make up a chart showing the trend of the net income before tax of Riss & Company and of those other intercity carriers?

A. Yes, sir, we did. May I say, for purposes of identification, again, that this is chart 2 in the report that these gentlemen have.

Q. And what you have just referred to is the one that has been marked for identification as No. 252?

A. Yes, sir.

(Plaintiff's Exhibit No. 252 marked for identification.)

Q. Just tell us now that chart was constructed.

A. The data for both the intercity carriers and for Riss & Company was again placed on an index basis for the years 1949, 1950, equal to 100. So that, subsequent years' figures are shown as a percentage of the figures which prevailed in 1949-1950.

9816 Q. And in this case the data you are talking about is the net income data and not the gross operating revenue?

A. That is correct, sir. Those index figures have been charted on this chart in this way--(indicating). The vertical scale shows the index levels for the years 1949 to 1950; on the horizontal scale, reading from left to right, there are shown the years, 1949 through 1957. So, each year has been plotted for the Intercity carriers and for Riss at its proper point for each year.

Q. Just tell us, if you will, how the intercity carriers' net income before taxes in 1957 compared to what it was during the basic period

1949-1950?

A. In 1957 the intercity carriers net income before tax was 93 per cent of the level in the years 1949 - 1950.

Q. And what was the situation as to Riss & Company's income, net income before tax in 1957 as compared to the base period 1949-1950?

A. Well, in the years 1949-1950 Riss & Company was earning money, as in accordance with these adjusted figures I have already described. So that means that in 1957 Riss' index was at a minus, 129.87 per cent relative to the 1949-1950 level.

Q. Again, whatever points are below the middle line on that

9817 chart represent losses, is that right?

The loss years, is that right?

A. Yes, sir, this line at zero means--

Q. Above the heavy line are profits, is that correct? A. That is correct.

(Plaintiff's Exhibit 253 marked for ident.)

Q. Now, then, did you also prepare this table that has been marked for identification as 253 showing the operating revenues, net income before taxes, and profit margins before tax, intercity carriers of general freight you previously referred to, and of Riss & Company? A. Yes, sir.

Again for identification for these gentlemen, that is, I believe Table 3 in the report they have.

Q. Now, those profit margins you have expressed in percentage terms, is that right? A. Yes, sir.

Q. Otherwise, you used the same data as to net income before taxes as appeared on the prior chart, is that it? A. Yes.

THE COURT: Wait a minute.

MR. GATES: I am not sure that the objection which I have interposed to these prior exhibits carries over to these others.

9818 THE COURT: All of these. Your objection runs to all of this, if you wish.

MR. GATES: Well, I certainly want that understood, your Honor.

THE COURT: Very well, sir.

MR. GATES: Unless I indicate to the contrary.

THE COURT: Very well.

THE WITNESS: Yes, sir.

The profit margin figure, as shown in this column headed "Profit Margin Before Tax."

BY MR. WRIGHT:

Q. Well, you had just better explain what you mean by profit margin and how you can give that, as distinguished from what you had on there of net income before tax.

A. Yes, sir. The profit margin is the relationship between the profit and the operating revenues. By that I mean this: The first column shows the operating revenues for the intercity carriers. The second column here shows the net income before tax of the intercity carriers. When you express the net income before tax, as a percentage of the operating revenues, we obtain the profit margin before tax, and that profit margin before tax is tabulated in the column so headed.

The same thing is done for Riss & Company.

9819 Q. And then did you also prepare a chart showing the trend of those profit margins before tax as you have just described? A. Yes, sir.

(Plaintiff's exhibit No. 254 marked for identification).

Q. And is that chart one which has been marked for identification as plaintiff's exhibit 254?

A. Yes, it is.

I believe, in the report these gentlemen have, it is Chart No. 3.

Q. Now, again, the column line on there represents the trend of Riss & Company profit margin before tax? A. Yes, sir.

Q. And the dotted line is for the intercity carriers?

A. That is correct, sir.

Q. Can you just compare for us in each case the figures at the beginning that are shown on there at the end of the period with those during the base period 1949-1950?

A. Yes, sir. In the years 1949 and 1950 the Intercity Carriers had a profit margin of 4.93 per cent, and 6.81 per cent respectively, for those two years.

In 1957, the profit margin was 2.89 per cent.

Q. That is for the intercity carriers?

A. Yes, sir, in the case of Riss & Company, its profit margin
9820 in 1949 was 2.76 per cent. In 1950 it was 7.0 per cent.

In 1957 it was minus 8.31 per cent.

Q. And then did you also prepare a sheet showing the method you used in estimating the 1957 constructive net income before tax for Riss & Company?

A. Yes, sir, and for identification purposes for these gentlemen, I believe that is shown as Table 4 on the report.

(Plaintiff's Exhibit No. 255 marked for identification)

Q. That is for the one which has been marked 255 for identification here. A. Yes, sir.

Q. Now, will you just describe how you arrived at the net income, constructive net income figure you had there.

By the way, what do you mean by "constructive net income"?

A. I mean by that the estimate of the earnings that Riss & Company would have had before taxes if it had followed the trend of this trucking industry.

Q. Just describe, if you will, how that was, how that other figure there was arrived at, and what you did to get it.

A. On this table we show the average profit margin of Riss & Company in the years 1949 to 1950, on an average to be 4.88 per cent.

9821 In the years--in those same two years the intercity carriers had an average profit margin of 5.87 per cent. In other words, the profit margin of Riss & Company in the two base years of 1949-1950 was less than the profit margin of the intercity carriers, and it was less to them by 0.99 per cent--or almost one per cent.

Now, in 1957 the intercity carriers had a profit margin of 2.89 per cent. Their profit margin had declined.

In order to estimate Riss' constructive profit margin for 1957, we do this. We say that the industry had a profit margin in 1957 of 2.89 per cent. We then deduct from that .99 per cent. That is the same differential which existed back in 1949-1950 period.

So, when we deduct that, we obtain a constructive profit margin for Riss of 1.90 per cent. Now, with the constructive profit margin--

Q. Excuse me. A. Yes.

Q. Then your figures there are based on the assumption that Riss' net profit margin before taxes in 19--

MR. GATES: I will object to this as being leading and suggestive. Let the expert testify.

9822 THE COURT: Yes, I think so. You can ask him a question.

BY MR. WRIGHT:

Q. Go ahead. I thought it would help clarify it. Go ahead and proceed, Mr. Meyers.

A. With a constructive profit margin for Riss--and by that, I mean the estimate of the profit margin it would have had in that year if it had followed the trend of this industry it is possible to then construct what its earnings or net income before taxes would be by applying that constructive profit margin to the estimate of the company's operating revenues for 1957.

We saw earlier that the intercity carriers have operating revenues in 1957 of 207 per cent of the levels of 1949-1950. So, if Riss & Company had followed the trend of the industry, its operating revenues in 1957 would

also have been 207 per cent of the level of its revenues in 1949-1950.

Now, Riss & Company's revenues in the period 1949-1950 were $15,990,000.

207 per cent--actually 207.3 per cent--the actual revenues of 1949-1950 is at a constructive operating revenue of $33,123,000. In other words, we are saying that, if Riss' operating revenues had followed the trend of this industry, they would have been at the level of $33,123,000

9823 in 1957.

Now, multiply the constructive revenues by the constructive profit margin of 1.90 per cent which yields a figure of $629,000 as the constructive net income before tax of Riss & Company.

Q. Now, that last figure you named was your estimate of what Riss & Company would have earned before taxes had it followed the trend of the trucking industry, is that right?

A. That is correct.

Q. And then did you go about determing what the value of Riss & Company as a going business would have been assuming that it had those earnings in 1957?

A. Yes, sir, we did.

Q. How did you do that?

A. Well, sir, in appraising securities, investors customarily tend to think in terms of a company's being so many times its earnings, for example, that it is worth three years' earnings or five years' earnings, or ten years' earnings, and so on. These multipliers, meaning this, namely, five years or ten years, or whatever, vary from time to time, and from industry to industry.

Now, our procedure was to determine what the multiplier was at this particular time, and for this particular industry.

9824 So, that we could use it in valuing rates.

Q. How did you go about finding out the multiplier, then, Mr. Meyers?

A. Well, there are a number of publicly-held trucking companies. Since they are publicly held this means that their prices are normal. It also means--

Q. Excuse me. When you say prices, you are referring to the prices of their stock?

A. That is correct, their earnings are also known. And from this known price and from this known earnings level, it is possible to compute the multiplier or the relationship between price and the earnings.

This is known as the price-earnings ratios.

Now, our next step then was to select a group of trucking companies which could be used for the purpose I have just described. There are a number of these, and we selected those which are engaged in transportation, intercity transportation of general freight, and those which had an active market for their stocks. We selected through this review that we made, a total of nine companies, that met this criterion.

Q. That was the criteria, that they had to be intercity carriers of intercity general freight that were publicly-owned and actively trading in their stock.

9825 A. That is correct.

Q. What were those nine companies that you selected?

A. The names of the nine companies are these: Associated Transport, Inc., Consolidated Freightways, Inc., Continental Transportation Lines, Inc.; Cooper-Jarrett, Inc.; Denver-Chicago Trucking Company, Interstate Motor Freight System, McLean Trucking Co., Overnite Transportation Company, Pacific Intermountain Express Company.

THE COURT: Mr. Wright, I think we will suspend at this time.

(Whereupon, at 12:26 p.m. the recess was taken until 1:45 p.m.)

9826 AFTERNOON SESSION

(Pursuant to recess the trial was resumed at 2:30 o'clock p.m.)

THE COURT: Are we ready to proceed?

(The jury is absent from the courtroom at this time.)

MR. BALL: Before the jury comes in, I have a motion to make, if the Court please.

THE COURT: Very well.

MR. BALL: The defendants move to strike from the record all of the testimony of Mr. Richard R. Riss with regard to comparisons between Riss & Company and The Transamerican, Cooper-Jarrett, Eastern Express, General Expressways, Yellow Transit, Denver-Chicago, for the reasons as follows:

First, that there has been no showing of comparability between Riss & Company and these companies necessary to permit such a comparison to be made.

And for certain opinions to be based thereon.

Second, that the record affirmatively shows many conditions affecting the business of Riss & Company without any showing that such conditions similarly affected the business of these other six companies, thus making the comparison completely untenable and without foundation.

9827 Third, that there are a number of specific matters such as the presence in this record of the intercompany transactions between Riss & Company and Transport Manufacturing Equipment Company, none of which were consolidated for purposes of comparison with similar situations in the other six companies.

THE COURT: All right, I will deny the motion.

(The jury resumed their places in the jury box at this point and the trial proceeded.)

Thereupon

ROBERT MEYERS

a witness, having been previously sworn, resumed his testimony further as follows:

THE COURT: All right, Mr. Meyers.

DIRECT EXAMINATION (resumed)

BY MR. WRIGHT:

Q. Mr. Meyers, before lunch you had identified nine trucking companies Management Planning had selected for the purpose of determining a proper ratio of going business value to earnings. I show you this chart that has been marked for identification as Plaintiff's Exhibit No. 256, having Market Appraisal data of nine Companies, nine Trucking Companies as of January 31, 1958, and I will ask you if that contains the data you used in
9828 determining that ratio. A. Yes, sir.

(Chart titled "Market Appraisal Data of Nine Trucking Companies as of January 31, 1958," was marked Plaintiff's exhibit No. 256 for identification.)

BY MR. WRIGHT:

Q. Now, in the lefthand side, in the first column you have the names of the nine companies, themselves. A. Yes, sir.

Q. Then in the first column after that, what is that heading and what appears under that as to management of each trucking company?

A. The heading is "Issue" meaning the type of stock outstanding for each of these comparative companies.

Q. Then you show opposite each company, do you, whether they have common or preferred stock or both, outstanding? A. Yes, sir.

Q. And then what do you have in the next column?

A. The next column shows the number of shares outstanding of the preferred stock, if it exists for each company, and for each company the number of shares of common stock outstanding.

Q. Then you have another one. What is in the next column?
9829 A. Sir, I think that I misspoke. You asked what is in the next column. I missed a column as I looked over.

Q. What is the column you missed?

A. There is a column headed "Location of Market," Mr. Wright.

Q. What do you have in there?

A. In that column there is shown the location of the market where each of these securities is traded. In some instances, the security is,

in one instance it is traded on the American Stock Exchange; another one on the New York Stock Exchange; and in the other instances on the over-the-counter market.

Q. Can you tell the jury what the over-the-counter market is, what that means?

A. The over-the-counter market represents the market that is made by over-the-counter dealers in stocks, which are not listed on a formal stock exchange.

Q. Those are publicly-held stocks, stocks of publicly-held companies, though, is that right?

A. They are, indeed.

Q. The stocks are actually traded but not on a formal exchange, is that correct? A. That is correct.

Q. Now, that was the second column. The third column had the
9830 number of each kind of shares outstanding, the number of preferred to common.

A. That is right, sir.

Q. The next column has what?

A. The next column shows the market price for each of these securities as of January 31, 1958.

Q. Now, where did those market prices as of that date come from that you have shown in the column?

A. We obtained those from the publication known as "The Bank and Quotation Record" which is a monthly publication which indicates the prices of securities as of the end of any given month, and since our valuation date is January 31, 1958, these were taken from the issue of February, 1958.

Q. That showed those prices as of that date. I notice you have in there sometimes more than one price. Does that indicate a range, or is that--

A. It is not. It is a bid and account. It means that on a given date a stock may have, as one does that I look at, a price of--a bid price of

15-3/8ths, and an ask price of 15-7/8ths. So, the two prices shown represent the bid and ask price.

Q. I see. Now, then, you have another column there. What is in the next column?

A. The next column is headed "Total Market Value."

9831 Q. How was that derived?

A. That is derived by multiplying the total number of shares outstanding by the market price of these securities. The multiplication then gives the total market value of each of these companies.

MR. SHEA: Would the witness indicate whether it is a bid or the highest price?

THE WITNESS: The price used is the average of the bid and ask.

BY MR. WRIGHT:

Q. Then in the last column you have what?

A. Well, in the last column, or the next column, sir?

Q. I am sorry. I did not realize. What is the next column?

A. In the next column it shows the 1957 net income before tax of each of these comparative companies.

Q. Now, where did those net income before tax figures come from that you have on that column?

A. From the ICC statements of each of these comparative companies.

Q. From the annual reports made to the Interstate Commerce Commission? A. Yes, sir.

Q. Now, I notice you have on there two of the companies that are

9832 on this chart here marked 243 for identification.

A. You mean, sir, there are two of these that are over there, sir.

Q. Yes, sir. A. Yes, sir.

MR. GATES: So that the record may be clear, the witness pointed--may we have him refer to the two exhibits by number.

THE COURT: Yes, by number, please, Mr. Witness.

THE WITNESS: You mean that there are two companies shown on exhibit 256, which are also on 243?

BY MR. WRIGHT:

Q. Yes. A. Yes, sir.

Q. Which two are those?

A. Cooper-Jarrett and Denver-Chicago.

Q. And now you have on there the net income - before-tax figure for each of those companies? A. Yes, sir.

Q. I think I will put this 243-A up here which has these figures on a readable form.

Now, I notice -- these I might say also were taken from the same ICC reports.

9833 Now, for Cooper-Jarrett what is the net income before tax figure you have on there? A. $1,044,000.

Q. Now, how about Denver-Chicago? What do you have on your chart there?

A. Denver-Chicago is $3,020,000, with a footnote on our table: And the footnote says that this excludes an extraordinary income charge of $73,569.

Q. That is, you adjusted the figure on the Interstate Commerce Commission report to add that item on the or to the income that is shown on here, $2,947,000?

A. That is right, sir.

Q. So that your figure there is what? A. $3,020,000.

Q. And you have the explanation of the adjustment on the chart there, there is a reference there to it, is there? A. Yes, sir.

Q. Now, then, what do you have in the last column?

A. The last column shows the price-times-earnings ratio for each of these companies.

Q. Now, how did you get that ratio?

A. The price-times-earnings ratio which shows the relationship

between price and earnings is computed by dividing the market value, the total market value of these companies, by their earnings. That has been
9834 done for each of these companies.

Q. That is, the total market value is the figure of each company shown in which column there on your chart?

A. The third column from the right.

Q. What is the figure you divided? What is the column the figure which you divided in that to get the ratio on the last column?

A. That column is headed "Net Income Before Tax for 1957." And is the second column from the right (indicating on chart.)

Q. Now, if you will just read those ratios for each of the companies--just read the name of the company and then this ratio in the last column that you have on your chart.

A. Yes, sir. Associated Transport, 13.9. Consolidated Freightways, 8.1. Continental Transportation Lines, 2.9. Cooper-Jarrett, 3.3. Denver-Chicago Trucking Co. 2.7. Interstate Motor Freight System, 2.0. McLean Trucking, 7.9. Overnite Transportation, 5.3.
9835 Pacific Intermountain Express, 12.2.

Q. Now, I want to ask you about these other companies that are on this 243-A and 243, Transamerican now, what is that, is that a publicly-held company? A. No, sir.

Q. There were no stock quotations that were available to you? A. No, sir.

Q. Is that also true of the Eastern Express? A. Yes, sir.

Q. And the General Expressways? A. Yes, sir.

Q. And how about Yellow Transit?

A. Yellow Transit was not a publicly-held company then, either.

Q. It is now? A. Yes, sir.

Q. When did it become publicly-owned?

A. Well, I would estimate eight or nine months ago, sir.

Q. But were there any quotations which were pertaining to any trading in this stock, in its stock as of 1958? A. No, sir.

Q. Then you have the figures on there for Denver-Chicago and
9836 Cooper-Jarrett, is that right? A. Yes, sir.

Q. They are the only two companies that were publicly-owned and had the stock quotations available in 1958, is that right?

A. That is right, sir.

Q. Now, what did you do next in arriving at a going-business value of Riss & Company?

An estimated value of Riss & Company?

A. These price-times-earnings ratios shown on this exhibit average 6.5 times.

Q. When you say "this exhibit," you had better refer to the number there.

A. Oh, on exhibit 256. These price-times-earnings ratios average 6.5 times.

Q. That is the average of the nine companies on that exhibit, is that right?

A. Yes, sir, but we do not use that average. We actually use a price-times-earnings ratio below that, namely, 5.5 times and the reason we do that is this: We recognize, from the outset, that the earnings as reported in the annual reports to stockholders of these, well, comparative companies, differ in some instances--

MR. SHEA: I move to strike the answer--"comparative"--until he has established some comparability.

9837 He should not be permitted to make an assertion of comparability until he establishes some basis for it.

THE COURT: What was the basis for it? Can you develop that?

BY MR. WRIGHT:

Q. First, Mr. Meyers, if you will just tell us what was the ratio you said you used?

A. The ratio we used was 5.5 times.

Q. Just tell us first, how you derived that 5.5 ratio.

THE COURT: All right, Mr. Shea.

MR. SHEA: I move to strike the adjective until there is some basis.

THE COURT: The what?

MR. SHEA: I move to strike the adjective "comparative," the assertion that there was anything "comparative" until he establishes some comparability.

THE COURT: Let us find out what he did. The motion is granted.

MR. WRIGHT: There is not any claim of comparability here, your Honor. All that was done was to take the data that was available as to publicly-owned trucking companies. You thought it was made perfectly clear in Mr. Meyers' testimony.

THE COURT: I have an objection running to all of this. I think

9838 I will let him testify.

MR. WRIGHT: Read the question, please.

(The reporter read the pending question.)

THE WITNESS: The 5.5 ratio is the average of the middle three of the range of price-times-earnings ratios shown on exhibit 256.

BY MR. WRIGHT:

Q. That is the middle three of the nine you have listed there, is that right?

A. That is right.

Q. Which three are those?

A. Those are Cooper-Jarrett, McLean Trucking, and Overnite Transportation.

Q. And then you were about to explain why you used that instead of a higher figure that you would have got by just averaging all nine companies? A. Yes, sir.

Q. Would you continue that explanation?

A. Yes, sir. We recognize that the earnings of these companies, as reported in the annual reports to stockholders, do differ in some instances from the earnings as reported in the ICC statements. These differences arise for various reasons, including the difference - and the manner in which depreciation is computed; and also the fact that annual reports to stockholders are usually on a consolidated basis.

9839 Now, recognizing this fact, it means then, in turn, that price-times-earnings ratios computed on the basis of earnings in the annual reports to stockholders would be different from the price times earnings ratio we show on this exhibit. So, to allow for this fact, and to be conservative, we have used not the average price-times-earnings ratio here of 6.5, but rather the price times earnings ratio of 5.5.

MR. SHEA: Now, once again, your Honor, I move to strike "to be conservative" because Mr. Riss, for instance, has taken the three-times-earnings. The witness should not--it is all right for him to testify to the facts--but to characterize what he is doing is something else.

THE COURT: He cannot comment on the fact as to whether he was conservative or not. That is a conclusion. That is for the jury to decide.

MR. SHEA: That is right, your Honor.

THE COURT: I assumed he would be cross-examined on this, but the jury will unquestionably understand that. It is not his testimony as to whether it was conservative or not. That is a question for the jury to decide. All right.

9840 BY MR. WRIGHT:

Q. Now, what did you do with that 5.5 ratio when you got it?

A. This price-times-earnings ratio was then applied to the constructed net income of Riss & Company as derived in the discussion earlier.

Q. That constructive net income figure was what? A. $629,000.

Q. That was an estimated figure, is that correct, sir?

A. That is right, sir.

Q. And then what figure did you arrive at?

A. By multiplying that 5.5 times the constructed net income of $629,000, yields a figure of $3,461,431. Now it is not suggested that this kind of method is precise, and, of course--

MR. GATES: Just a moment. I do not think that is proper testimony from this witness.

THE COURT: Now, what would you call the figure $3,261,000-odd? You get that by multiplying $625,000 by 5.5, was it?

THE WITNESS: Yes, sir.

THE COURT: What do you call that figure you get?

THE WITNESS: This is an estimate of the going concern value of Riss & Company on January 31, 1958, if it had followed the trend of the industry.

* * *

CROSS EXAMINATION OF MR. MEYERS BY MR. GATES

9847 Q. I think you testified that you went to Harvard University?

A. Yes, sir.

Q. And you were graduated when? A. 1938.

Q. What was your degree? An A.B.? A. Yes, sir.

Q. What was your Major? A. Economics.

* * *

9890 Q. I think you testified that you made certain adjustments to Riss' 1957 net income before taxes as reported in its Form A to the Interstate Commerce Commission?

9891 A. That's right.

Q. Upon what theory do you consider that it is appropriate to make these adjustments?

A. They were extraordinary and non-recurring.

Q. Aren't they Form A's that were required by the I.C.C. of all motor truck carriers?

A. You say, are Form A's required?

Q. Yes. A. Yes, sir.

Q. And aren't they required to be accurately and completely kept? A. Yes, sir.

Q. And aren't the reports and the content and the form thereof prescribed by regulation? A. Yes, sir.

Q. But you eliminated those items which you believed to be extraordinary, and normal, non-recurring, and in the year 1957, this was $2,669,000.00, if my memory serves me correctly. A. It does.

Q. Now, as a result, Riss' income before taxes was reduced in that amount, was it not? A. Yes, sir.

Q. And whereas Riss & Company had reported to the I.C.C. a profit before taxes of $1,600,000.00, you now show a loss for that period;

9892 is that correct? A. That's right.

Q. Now, in determining the 1949, 1950 and 1957 net income before taxes, of all inter-city carriers of general freight, did you similarly exclude the extraordinary income of all those carriers? A. No.

* * *

9898 Q. Mr. Meyers, yesterday afternoon you testified in substance that you had made hundreds of valuation studies.

I assume that those valuation studies to which you referred were based on the actual earnings of the companies that you studied. Is that correct?

A. That's right, sir.

Q. Now, in this case, you also made a valuation study of Riss & Company which was based on actual earnings, did you not? A. Yes, sir.

Q. And you came to the conclusion that the going-concern value of Riss & Company was not in excess of a half million dollars, if I remember correctly. A. That's correct.

Q. Now, I asked you yesterday whether in any case within your knowledge the methods employed by you in this case had been used, and you replied in the affirmative.

I'm not sure (1) that you understood my question, or (2) that maybe
9899 I hadn't stated exactly what I had intended, but I want to clarify the matter:

You have done four things in this study, as I understand it:

First, you determined what you call actual value, that is, the $500,000.00 figure, and that is based on earnings or losses as the case might be. That is correct, is it not? A. Yes, sir.

Q. Now, second, you constructed a constructive gross income, did you not? A. Yes, sir.

Q. Now, you had done work comparable to this previously in connection with the Section 722 work that you did, where you had a construction of an average base period net income, had you not?

A. Yes, sir; and for other purposes, too.

Q. That's right. Now, how is that kind of a study meaningful?

A. You say "that kind of study," sir. You are referring to what study?

Q. In the construction of a gross income. What is the meaning of that? What is the purpose of it?

A. In this instance, sir?

Q. Well, in any instance.

9900 A. Well, sir, let me take this kind of an example, since we say "any instance. If we are attempting to determine what a company's

financial requirements are, the respective sales volume for gross income are not quite the same, but let's call it sales volume, might be it becomes of distinct significance in estimating what a company's financial requirements may be.

If a company's sales five years from now are going to be double what they are today, it means that the company will necessarily have to finance a larger sales volume. And, therefore, what the sales volume might be five years from now becomes of significance.

Q. Now, in this case you weren't called upon at all to consider the estimated financial requirements of Riss & Company, were you?

A. No, sir.

Q. Well, now, can you relate the purpose of the construction of a gross income to this case?

A. We were attempting in this instance to estimate what the earnings of Riss & Company would have been if it had followed the trend of the inter-city motor carriers, and in order to do that, we estimated what its sales would have been and estimated what its profit margin would have been, so that we could estimate what its net income would have been.

9901 Q. Now, that really brought you, then, to the third part of the study, did it not, where you constructed what you term a constructive net income? A. Yes.

Q. And that was the $629,000.00 figure? A. That's correct.

Q. Now, both steps 2 and 3, if I may call them that -- and you understand what I mean by that? A. I think so.

Q. -- involved, shall we say, hypothetical situations.

A. All right, yes.

Q. And, again, the construction of the net income before taxes is meaningful only if you assume that Riss & Company had followed the trend of the trucking industry? Am I correct?

A. You say it becomes meaningful? It has meaning other than that. That's the basis of estimating the figure.

Q. Now, finally, after you had developed a constructive gross income and a constructive net income before taxes, you then developed a price-earnings ratio by reference to nine other publicly-held trucking companies, and from this you developed a constructive value based upon a constructive net income before taxes, based upon a constructive gross income. Am I correct? A. Yes, sir.

9902 Q. Now, my question is this:

Do you know of any case in any court where the constructive value of a company has been determined in the manner that I have just described, combining steps 2, 3 and 4, where you have a constructive value based upon a constructive net income before taxes, based upon a constructive gross income? A. No, sir.

Q. So that this is the first instance where all of these elements that I have described have been combined in one case, so far as you know?

A. You asked about the court, sir. I presume this has been done for other purposes and other reasons, but you asked about a court, so I shall answer you, yes.

Q. You don't know of any case in court?

A. That's what I said, sir.

Q. Do you know of any case in any administrative proceeding, where these elements have all been combined in one case?

A. Offhand, I don't know of any, no, sir.

Q. At least, you have never done it before. A. That's right.

Q. Now, I assume, Mr. Meyers, that this method of valuation

9903 which we have just described could be used to determine the impact of any identifiable influence upon the business of a company?

A. I don't understand that question, sir.

Q. Well, wasn't the purpose of your study, among other things, to develop the impact or to show the effect of what you call a deviation from the trend of the trucking industry in so far as it applied to Riss?

A. Well, I don't know whether that's the right wording for what we have done, sir. Let me say what my understanding of the wording is, if this will help to answer that question.

Q. Please do.

A. My understanding is that we were developing and did develop what the value of Riss & Company would have been if it had followed the trend of the trucking industry, and then that constructed value in relation to our estimate of our actual value as of January 31, 1958 indicates the loss in going-concern value between those two figures.

Q. Now, you concede, do you not, Mr. Meyers, that merely because there is a trend in an industry doesn't mean that all members of the industry are going to follow that trend?

A. I certainly do.

Q. Some of them are going to be above and some of them are going to be below?

* * *

9904 Q. Now, will you, as an expert, explain the factors which you feel should be taken into account in selecting a base period for determining the constructive net income of a business, using the method you have employed?

9905 A. That the base should not be affected by abnormal circumstances, I would say is the essential one. And in this instance we have used the period 1949-1950 as a base, as you know, and we used it as a base for two reasons; (1) that they were the last two years in which Riss & Company was not importantly influenced by the actual hostilities of the Korean War, and (2), that they were the last two years in which Riss & Company was not importantly influenced by the matters under contention before this court.

* * *

9937 Q. Now, were you told in connection with your study that Buckingham Trucking Co., a willing buyer, had offered to buy, subject to approval of the Interstate Commerce Commission, 2500 route miles at a million dollars? A. No, sir.

Q. So you did not consider that at all in your evaluation of Riss & Company? A. No, sir.

Q. Now, the average sales price, as indicated by the sale and proposed sale on the part of willing buyers, is something in excess of $400 per route mile, isn't it? A. Apparently, sir.

Q. That is right. And that means that the route mileage has at least a $9 million value and perhaps as much as fifteen or sixteen million dollars, does it not?

A. I do not know that you can draw that conclusion there, sir, but perhaps it is true.

* * *

9967 Q. Was there any examination made of the books of TM&E?

A. I doubt it.

Q. Was any consideration given by Management Planning to the fact that Riss & Company has an affiliate known as TM&E?

A. Certainly, we are aware of that, sir.

Q. I understand you are aware of it. But, in making your study and in your valuation of Riss & Company, and also in your construction of the gross revenue and the constructive value, did you consider the fact that TM&E was an affiliate of Riss & Company? A. No, sir.

Q. Now, isn't it a fact, Mr. Meyers, that a trucking company which owns its equipment and terminals will treat the various items of ex-
9968 pense, both above and below the line, differently on the Form A from a company which leases all of its equipment, operating equipment and terminals, from an affiliate?

A. May I be -- may I show my ignorance by asking you what you mean by "above and below the line"?

Q. This is a term that we have been using in this proceeding which perhaps to a banker is not as accurate as it should be. But I will put up in front of you TEA exhibit 5009 for identification. That is a recap., Mr. Meyers, of the operating statement in the Form A. We have drawn a line completely across the exhibit under the "Net Operating Revenue." Do you see that? A. Yes, I do.

Q. Now, we have been using the terminology perhaps a little bit loosely, I can see here, particularly with this exhibit of "above and below the line." A. I see, sir.

Q. Now, do you remember the question?

A. No, I do not.

MR. GATES: Mrs. Sweet, would you read back the question to Mr. Meyers?

(The reporter read the question.)

THE WITNESS: I would guess, I would say that is probably true, yes, sir.

9969 BY MR. GATES:

Q. Just to show the differences, Mr. Meyers, I am going to ask you to assume that at the beginning of a given year -- perhaps you may want to make some notes as I go along with this question, it is rather long--

A. All right.

Q. I will start all over again.

I ask you to assume that at the beginning of a given year, one trucking company, which we will call Company "A" buys $12 million worth of new equipment, consisting of tractors and trailers.

Now, during the year the pays $600,000 interest on money that it has borrowed to pay for this equipment. It depreciates the equipment on the basis of a five-year life, with a ten per cent residual value, using straight-line depreciation.

A. Do you have that figure?

Q. Sir?

A. Do you have that depreciation figure, or do you want me to figure that?

Q. I can give it to you. Let us get the facts first.

A. All right.

Q. During the same year a company retires old equipment of the
9970 same type, and realizes a capital gain of two million dollars on the transaction.

Now, in this same year a second trucking company that we are going to designate Company B causes these identical transactions to be entered into by an affiliate, which has always owned the equipment and always sold equipment and made purchase and took title, and then leased it to Company B, at a rental which includes interest, and it would be the same situation, the same $600,000, depreciation computed on a five-year double declining balance but without any profit to the affiliate.

Now, given these facts, and assuming that Company A and Company B had otherwise identical operations and financial results during the year in question, isn't it a fact that company A's net operating revenue for the year will be $5,240,000 greater than Company B's net operating revenue?

A. It may be, sir, but I cannot answer that question just on the basis of -- just like that.

Q. Well, if you want some figures, I will try to accommodate you.

A. All right, sir.

Q. With respect to Company A, the depreciation would be $1,200,000?

A. $1,200,000?

9971 Q. Excuse me.

A. I beg your pardon.

Q. I misstated myself. You are going to deduct ten per cent from the $12 million which gives you a figure of $10,800,000. And one-fifth of that is $2,160,000.

A. This is the depreciation figure you are giving me now.

Q. That is right. Company B, the first year will deduct 40 per cent of the $12 million on the double declining balance basis or $4,800,000. Now, what other figure would you like?

A. I am not sure. I am not in a position -- I cannot calculate this that quickly here on the stand. I would be glad to calculate it at the --

9972 Q. At the noon recess?

A. Yes, sir, if I may do that.

Q. Let me give you the conclusions which I have asked you to verify. A. Surely.

Q. I have asked you whether under the circumstances the question contained in my question, the net operating revenue for Company "A" would not be $5,240,000 greater than that of Company "B?"

A. This is, would not the net ordinary income -- is that what you are asking, before --

Q. The net operating revenue, the figure above the line.

A. Oh, the net operating revenue?

Q. Yes. A. I see.

Q. This figure right here. A. All right.

Q. And the second part of my question is whether under the same circumstances that company's net income before taxes will be $4,640,000.00?

A. What was the figure?

Q. $4,640,000.00. A. $4,640,000.00.

Q. Right -- greater than that of Company "B?"

9973 Well, maybe we had better do it on the board right now, and let the jury see how this works:

Let's put a heading on that, Mr. West, if we may, "The difference in treatment of expense items."

Then I think you might put a "Company A" about the middle of the page, and " Company B" over on the right-hand side.

MR. GATES:

Q. Do you suppose it will be easier, Mr. Meyers, to start with interest?

Now, the interest in both cases is $600,000.00, is it not?

A. Yes.

Q. Now, Company A owns the equipment. Would the interest be above or below the line? That is, would it be above the net operating revenue, or below, of Company A?

* * *

THE WITNESS: Well, as I remember that Form A, sir, I believe it would go for interest below the line.

9974 MR. GATES: Would you put down below the line for Company A, Mr. West, "Interest, $600,000.00."

BY MR. GATES:

Q. Now, Company B also has to pay $600,000.00, but that is included in the rental charge.

Where will that $600,000.00 go, as far as Company B is concerned?

A. Well, I believe that, sir, will be in the operating and maintenance expense, above it.

Q. That would be above the line with respect to Company B?

A. Yes.

Q. Now, the next item we will consider will be depreciation:

Company A's depreciation is on a five-year useful life, straight line, with 10 per cent residual value; which means that its depreciation is $2,160,000.00 annually.

Where would that appear, above or below the line?

A. Above the line.

MR. GATES: Insert that figure "depreciation" above the line for Company A.

MR. WEST: $2,160,000.00.

MR. GATES: $2,160,000.00.

BY MR. GATES:

Q. Now, Company B's depreciation is covered in its rental to the 9975 affiliated company, and that is computed on a five-year double declining balance, which would mean that you would take 40 per cent the first year, would you not? A. Yes.

Q. And if the cost of the equipment was $12,000,000.00 that would be $4,800,000.00, would it not?

A. You would have a residual, sir.

THE COURT: I don't think the jury will hear you very well with your back turned to them.

THE WITNESS: I believe you said there was a residual, did you not?

MR. GATES: Not on the double declining balance, no, sir.

* * *

THE WITNESS: Your question now, sir, was, where would this depreciation expense occur?

BY MR. GATES:

Q. That's right.

A. That would, of course, in the case of Company B, also be in this rental that it pays.

Q. Operating and maintenance expense?

9976 A. That's right.

MR. GATES: So, would you put up there, Mr. West, a figure of $4,800,000.00 for Company B, please?

(Placed on board:)

MR. WEST: Shall I put "depreciation" in parentheses after this?

MR. GATES: Yes, if you please.

BY MR. GATES:

Q. Now, what is the total net operating revenue, or I should say, the operating expenses, of these two companies at this point?

A. $2,160,000.00 in the case of Company A, and $5,400,000 in the case of Company B.

MR. WEST: Shall I total it here now?

MR. GATES: If you please.

(Upper section of chart totaled.)

BY MR. GATES:

Q. Now, as to the capital gains of $2,000,000, where would Company A enter that?

A. Under "Depreciation Adjustment," I believe.

Q. That would be above the line? A. Yes, sir.

MR. GATES: All right; would you put that in above the line, please?

9977 MR. WEST: Since this is a credit against an expense item, should I put it in parentheses?

MR. GATES: That's right, if you please.

MR. WEST: $2,000,000.00?

MR. GATES: $2,000,000.00.

BY MR. GATES:

Q. Now, where would it be entered with respect to Company B?

A. Well, it goes below the line. I'm trying to find the --

Q. Didn't you forget that the affiliate owned this equipment?

A. Beg your pardon?

Q. Didn't you forget that the affiliate owned the equipment?

A. Oh, I see. Yes, sir.

Q. So it wouldn't be under it at all, would it? A. That's right.

Q. That $2,000,000.00 doesn't appear on this statement at all.

Now, doesn't that mean on the basis of those figures, that the net operating revenue of "A" --

MR. GATES: Mr. West, you will have to strike out that "2" in front of "total expenses."

I see you have already done so. MR. WEST: Yes, sir.

9978 BY MR. GATES:

Q. The net operating revenue is a difference of $5,240,000.00?

A. Yes.

MR. GATES: All right, would you put down "Difference in net operating revenue, $5,240,000.00."

(Placed on board:)

MR. GATES: And then would you put another caption, Mr. West, "Difference in net income before taxes."

(Placed on chart.)

BY MR. GATES:

Q. What is the difference there?

A. Now, of course, I am just trying to remember on this depreciation adjustment item, that is taxable at 25 per cent; is that correct, sir?

Q. I said, net income before taxes.

A. Oh, I beg your pardon, sir.

Well, the difference will be the $5,240,000 less $600,000.00.

Q. Or $4,640,000.00. A. Right.

Q. So, if Company A owns its equipment and Company B leases it, under the circumstances that I have given you in my hypothetical question, the net operating revenue of Company A under identical circumstances with

9979 Company B, was $5,240,000.00 greater, and its net income before taxes $4,640,000.00 greater? A. Yes, sir.

* * *

10,022 Q. Now, you then took Riss' average revenue for 1949 and 1950, which was $15,999,000 and multiplied it by the percentage growth of the industry, which came out to 207.03 per cent, to determine what its constructive revenues for 1957, which proved to be 33,123,000?

A. Yes, sir.

Q. Which you then multiplied by Riss constructive before-tax margin, in other words, by 1,898 to determine what Riss' constructive net income before taxes should have been, and you came out then with $629,000. Is that correct? A. Yes, sir.

Q. Did you make any effort to test the accuracy of this method of determining constructive net income against the actual results of the nine companies which you chose for this purpose?

A. Well, I do not know what kind of a check you are driving at, sir.

Q. Well, I mean by that, you knew what the actual results were

10,023 of Associated and Consolidated and Denver-Chicago and Cooper-Jarrett, the nine carriers you took, did you not?

A. Yes, sir.

Q. Now, did you make any effort to check the accuracy of your method of constructing net income before taxes against the actual results of these companies?

A. Of the other nine companies, you mean now?

Q. Yes. A. No, sir.

Q. Well, let us just try it and see what the result is. I think the jury might be interested. It is not too much of a task, is it?

A. Oh, I guess it is not. It will be easy.

Q. I suggest let us begin with Denver-Chicago. I am going to ask Mr. West if he will put up a blank sheet of cardboard and we will put three headings on it.

To the left, Mr. West, will you put up the Constructive Net Income before Taxes.

MR. WEST: I will put the headings on. Denver-Chicago. We will construct the constructive net income before taxes of Denver-Chicago first.

BY MR. GATES:

Q. Now, from the exhibits which you have introduced, Mr. Meyers, the operating revenues of Denver-Chicago for 1949 were $11,712,000, were they not?

10,024 A. I do not think I introduced an exhibit, sir, showing Denver-Chicago's 1949.

Q. Well, perhaps I am in error. It is true, is it not, that you have those figures available in the study which you prepared.

A. I believe they were shown on there, yes, sir.

Q. Do you have a copy of that study available?

A. Not here, I do not, sir, no.

Q. Do you have one in front of you now? A. Yes, sir.

Q. Now, that is referring to Table No. 6, is it not?

A. Yes, sir.

Q. And the operating revenues for Denver-Chicago for 1949 were $11,712,000 and for 1950, $14,628,000. Will you accept my word just for the purpose of expediting things, that the average is $13,170,000?

A. Yes, sir.

Q. Now, what was the 1957 constructive operating revenue of Denver-Chicago, applying your method?

A. Will you give me that average?

Q. $13,170,000. You would multiply that by 207.03, would you not?

A. 207.03, was it not, sir?

Q. That is right. A. Yes, 277,266.

10,025 Q. Now, from table 6, also, you can find the net income before taxes in 1949 at $1,185,000, right?

A. Yes, sir.

Q. What was its profit margin? A. 10.1, sir.

Q. Did you carry it out to three decimals? A. 10.117.

Q. All right, and its net income before tax was $2,730,000, was it not? A. Yes, sir.

Q. Would you compute the profit margin for 1950, please?

A. Yes, I did not get three decimals. 18.6 is as far as I got.

Q. Well, I carried it to three decimals.

A. What do you have, sir?

Q. 18.663. A. What was that figure?

Q. 18.663. A. All right.

Q. And the average of the two years would then be 14.391 per cent, would it not?

A. That looks about right, yes, sir.

Q. Now, if you will refer to table 4, which is exhibit 255, the industry's before-tax margin average for 1949 and 1950 was 5.867, was it not? 10,026 A. Yes, sir.

Q. And the spread therefore was a plus 8.524, in favor of Denver-Chicago, right? A. Yes, sir.

Q. Now, in order to determine the 1957 constructive profit margin, you add the spread to the industry average of 2.886--

A. No, I did not follow you there, sir.

Q. Don't you add the plus 8.524? In other words, that is the spread between the industry average and Denver-Chicago?

A. Oh, I see what you mean. I did not understand what you were driving at.

Q. Isn't that what you do?

A. Yes, that is what we did for Riss, yes.

Q. Don't you come out with a 1957 constructive profit margin of 11.41?

A. Well, sir, you have not made the calculations. But that looks to be about right.

Q. All right, now will you compute what Denver-Chicago's 1957 constructive profit should have been?

A. Yes, 3774, does that check out with you?

Q. No, it does not.

10,027 A. Wait a minute, sir. I think I will do it again.

I still get 3,774.

Q. All right. You may want to check it over tonight. But we will accept that. What is the figure again?

A. Three million seven hundred seventy-four.

Q. Put up a heading "Constructive Profits."

MR. WEST: I put "Constructive Net Income Before Taxes."

MR. GATES: And the figure is $3,774,000?

THE WITNESS: 3,774,000, yes, sir.

BY MR. GATES:

Q. Now, by reference back to table 6, what was the actual of Denver-Chicago for the year 1957? A. $3,020,000.

Q. $3,020,00? A. Yes.

Q. That does not even come within the five or six per cent margin of errors we talked about yesterday, does it?

A. I would have been surprised if it had.

Q. Well, let us try it for Associated, see what kind of result we get.

MR. GATES: Will you put down there the actual of 3020, Mr. West. MR. WEST: Yes.

10,028 BY MR. GATES:

Q. Before we proceed with Associated, what would you expect the margin of error to be? I understood you yesterday to say five to six per cent.

A. You asked me margin of error on total value in valuing any case. Now, I think we also agreed yesterday that in computing any average

of any kind there are some above an average and some below an average, and the average is the average of necessary pluses and minuses.

So, any one company is going to be above or below. The spread can be extreme, for any one company.

Q. Let us see what happens with Associated?

A. All right, sir.

Q. In 1949 operating revenues were $28,621,000 were they not?

A. Yes, sir.

Q. And the 1950 operating revenue was-- A. $35,040,000.

Q. The average is 32,011,000, is that what you get?

A. Well, I have not computed it. If that looks right, all right; I am willing to take your word on those, sir.

10,029 Q. Very well, now how about the 1957 constructive operating revenues of Associated? That would be 27.03 times $32,011,000, would it not? A. 2703 being what, sir?

Q. 20703?

A. Oh, 20.703.

Q. 207.03.

A. I beg your pardon. I did not understand you. Yes, 207.3-- 207.03 times that.

Q. Times that $32,011,000? A. Yes, sir.

Q. Do you want to compute that on your calculator?

A. $66,272,000.

Q. The 1949 net income before taxes of Associated was $2,109,000 was it not? A. Yes, sir.

Q. And the profit margin 7.369 per cent?

A. What was that figure, sir?

Q. 7.369 per cent. A. All right, sir.

Q. Will you accept that? A. Yes, sir.

Q. And the 1950 net income before tax is $3,243,000?

A. Yes, sir.

Q. And the profit margin for the year 1950 was 9.161 per cent?

10,030 A. 1.161 per cent?

Q. Yes, sir. A. All right, sir.

Q. And the average profit margin for the two years, therefore would be 8.265 per cent? A. 8.265?

Q. Correct. A. All right, sir.

Q. Now, the spread between Associated and the industry for 1949-1950 would be 2.398, would it not? A. 2.398?

Q. Yes.

A. I will take your word for it. That sounds right.

Q. It sounds all right to you? A. Yes, sir.

Q. Now, you again would add that to the industry average for 1957, would you not? A. Yes, sir.

Q. And that would give a constructive profit margin of 5.284 per cent? A. 5.284?

Q. Yes. Now, will you compute the constructive before tax? The constructive income before tax? A. Yes, $1,691,000.

Q. Have you not made an error?

10,031 A. Maybe. I probably have, sir. What was the constructive sales figure? The constructive operating revenues?

Q. $32,011,000. A. $32,011,000.

Q. Yes, excuse me. $66,262,000.

MR. WRIGHT: I think we could save some time, if Mr. Gates has the figures computed, to just write them up on the board and we will check them over tonight for him and we will save some time.

THE COURT: Can't you put your figures up there subject to check.

MR. GATES: Let Mr. Meyers finish this one, and then I will do it for the others.

BY MR. GATES:

Q. The constructive operating revenue for 1957 would have been $66,272,000. A. Yes, all right, 3,205,000.

MR. GATES: Mr. West, would you put that figure on the board as the constructive income before taxes for Associated. $3,205,000.

BY MR. GATES:

Q. What was the actual income before taxes of Associated?

A. $411,000.

10,032 Q. That is a margin of about 750 per cent error, is it not?

A. It is your label "Error," sir. It is a difference of that amount, yes.

Q. Well, it is a discrepancy of 750 per cent.

A. I am going in differences.

MR. GATES: Well, now, Mr. Gates, in order to facilitate matters, would you next put down "Consolidated" and the constructive profit before taxes subject to Mr. Meyers' check, using his methods, was $849,000.

And the actual was $2,532,000. Now, would you write down please, "Interstate."

The Constructive profit before taxes is $957,000.

The actual profits as reported at the ICC $2,471,000.

Next, PIE, Pacific Intermountain Express. Put that down, please. The constructive was 3,908,000. And actual was $1,643,000.

Make a final column there, Mr. West, which we will call "Margin of Difference."

(Mr. West writes on the chart.)

MR. WRIGHT: I would like to ask Mr. Gates if he is going to put the other four on there, or whether he is going to stop here, or what?

10,033 THE COURT: Are you going to put the other four on?

MR. GATES: I think this is enough to illustrate it. We have made the computation.

THE COURT: If you want them on there, you can put them on.

MR. WRIGHT: We would like to have the figures -- I would like to know what the nine are. They do not have to go up there just so they are available.

THE COURT: Very well.

MR. GATES: I want to make one statement with regard to the four others. We have not re-checked these last four to be absolutely sure of the computation. They are, we think, correct with respect to the first five.

THE COURT: All right.

MR. GATES: I did not want to labor the point by taking all five. But for whatever it is worth, I will put on the board the other four. I think you can write smaller, Mr. West.

THE COURT: Put them all on there.

MR. GATES: Cooper-Jarrett, $642,000 constructive. $1,044,000, actual.

MacLean, $631,000 constructive, $1,493,000 actual.

10,034 Overnite, $542,000 constructive; $570,000 actual.

MR. WEST: $570,000.

MR. GATES: Right.

I guess I left out Continental. Continental is the last one.

$820,000 constructive. $1,092,000 actual.

BY MR. GATES:

Q. Now, Mr. Meyers, I assume you are taking down the figures which have just been put on that chart. A. A few of them.

Q. In order that--

A. Sir, would this gentleman mind moving so I can see those figures: I am sorry.

Q. You in your computation for Denver-Chicago arrived at a figure for the constructive net income before taxes of $3,774,000?

A. What company is that, sir?

Q. Denver-Chicago. A. Sorry.

Q. In my computation I arrived at $3,111,000. You might note that figure. A. $3,111,000.

Q. Yes.

A. You are probably right, sir. All right, go ahead.

Q. I have a certain margin of error.

10,035 A. So do I.

Q. Now, roughly, Mr. Meyers, what is the margin of difference between the constructive figure of net income before taxes for Denver-Chicago, and the actual net income before taxes reported to the Interstate Commerce Commission? A. In dollars, he wants?

Q. Percentages. A. Percentages?

Q. Yes.

MR. WRIGHT: Obviously it depends on which figure you use. I think the question should be asked in terms of whether we are using the $3,001,000 which Mr. Gates tells us is correct, or what we have up there.

Let us put Mr. Gates' figures up there.

MR. GATES: Put my figure up there, $3,111,000, in parentheses.

If I am wrong, then we will cross it out.

(Mr. West writes on the chart.)

BY MR. GATES:

Q. Let us take your figure first, what is the margin of difference.

A. Well, the difference is about $754,000, which is about 20 per cent.

10,036 MR. GATES: All right. Would you put 20 per cent there, Mr. West?

BY MR. GATES:

Q. Now, assuming that my figure is correct, what is the margin of difference? A. About two and a half per cent.

Q. All right. Put that there.

THE COURT: Let me ask you a question. Maybe I should not, though. Who is going to decide who is right?

MR. GATES: It is a mathematical computation, your Honor.

THE COURT: I am glad we have got the jury over there, that is all.

MR. GATES: I am sure that Mr. Meyers and I can agree overnight as to whether I have made a mistake--which is the more likely--or he has.

THE COURT: All right.

MR. GATES: I did not use a calculating machine.

BY MR. GATES:

Q. What is the margin of difference with respect to Associated Transportation Co. ?

A. 90 per cent, approximately.

Q. The difference between $411,000 and $3,502,000?

10,037 A. Well, it is a difference of about $3,100,000, $3 million 1 over 3 million five is in the neighborhood of 90 per cent. I just guessed.

Q. Do you want to work them all one way?

A. We have to work them one way or the other. We cannot work them both ways.

Q. That is all right with me. All right, put down 90 per cent. It means you are ten per cent accurate, is another way of putting it.

A. Don't say I am ten per cent accurate, sir. This is--

Q. All right. Now, how about for Consolidated?

A. The difference there is $1 million 7, approximately. That is about 200 per cent.

Q. All right, and for Interstate?

A. Well, it is different--the difference there is about a million-five. So that is about 150 per cent.

Q. Very well. And for Pacific Intermountain Express.

A. The difference there is 2 million three, over 39. That is about 60 per cent.

Q. Very well, put that down.

A. These are just approximate, these percentages.

Q. I understand. A. Yes.

Q. And for Cooper-Jarrett?

10,038 A. The difference is about 400,000, that is about 65 per cent.

MR. GATES: All right, Mr. West. Write down 65 per cent.

BY MR. GATES:

Q. For MacLean Trucking Company?

A. The difference is about $860,000, so it is a difference of about 140 per cent.

Q. And for Overnite?

A. The difference is 28,000--that is 5 per cent.

Q. And for Continental?

A. The difference is $270,000 which is about 25 or 30 per cent.

Q. 25 per cent? A. 30 per cent is probably closer.

MR. GATES: May we have that marked by the Clerk as TEA exhibit for identification with the next number?

DEPUTY CLERK: No. 3 defendant TEA 5034 for identification.

(Chart is marked TEA exhibit 5034 for identification.)

MR. GATES: For the record TEA exhibit 5034 for identification is a chart on which there appear the names of the nine publicly-held companies selected -with three columns headed "Constructive Net

10,038-A Income before Taxes, 1957: Actual Net Income Before Taxes, 1957 and Margin of Difference."

10,039 Now, inviting your attention, Mr. Meyers, to TEA's Exhibit 5034 for identification, except for Overnite and possibly Denver-Chicago, the margin of difference in every case exceeds 30 per cent, does it not?

A. Yes, sir.

Q. And in one case the margin of difference is as much as 200 per cent, is it not? A. Yes, sir.

Q. Sir? A. I said "yes, sir.

Q. Now, how do you account for the fact that taking the nine companies which you have selected and applying the methods which you employed, the relationship between the actual operating results and the constructive net income before taxes shows such a disparity?

A. For this reason:

We were talking, and when we talk about this "control group" as you call it, sir, about an average, an on average.

Q. A what? A. An on average.

Q. O-N (spelling)?

A. Yes. I will re-word it differently:

And the average profit margin of these companies turned out to be as shown in our report.

10,040 This average, whether it be of the operating revenue or of the net income before tax, or the profit margin, necessarily and by definition represents a substantial spread from one company to another. And an average is exactly what the word says. You take these spreads and you add them together and divide by the number of companies and you obtain an average.

This means that there are companies that differ very substantially, one from another, in computing an average.

And so it would be very unusual, sir, if we could take companies like we have taken here and find out that they come out to be average.

Q. Now, at best, Mr. Meyers, again directing your attention to TEA's Exhibit 5034 for identification, you could only say that two of those companies began to approach the average, couldn't you?

A. Yes, sir, that's right. There are two companies that are close to the average.

Q. That is assuming that my arithmetic with respect to Denver-Chicago is correct, and yours is incorrect?

A. That's right.

Q. Now, it's true, is it not, that if you had been asked to evaluate any one of the companies shown on Exhibit 5034 for identification, except Overnite, that the result which you would have reached would have been
10,041 substantially different from the actual results?

A. If we had said -- if we were asked to value the companies on the basis that they had followed the average trend, our answer would be different from the actual, yes.

Q. It would be substantially different, would it not?

A. Yes.

Q. Now, aren't you really testifying, Mr. Meyers, that except in the rare instance, no trucking company is an average trucking company?

A. I agree with that.

Q. And of the 965 which are in the initial group, there may be by reason of the spread, a few that come within what you might call the average range?

A. That's right.

Q. And you don't know whether Riss & Company would fall within or without that average, do you?

A. No, sir. We had said, however, that we were valuing them on the basis that they did follow the average.

Q. That is an assumption you have made?

A. That's right.

* * *

10,050 Q. Now, will you state whether, in your opinion, by application of your method, you think you could have forecast that Ford, General Motors, and Chrysler would prosper and that Hupmobile, Franklin, Stutz, Chandler, Pierce-Arrow and a lot of others would have passed completely out of the picture?

A. By this method alone, no, sir.

Q. Now, wouldn't you agree, again, that in the automobile industry, management, organization, capitalization and a great many other factors, are controlling, in determining whether a company follows a trend of the industry, goes above it or goes below it?

A. They are certainly important.

Q. Well, wouldn't you say they are controlling?

A. Well, I am not prepared to say that, sir, but I agree that they are important.

Q. Now, in your study of Riss & Company and of the trucking industry, you haven't made any investigation of these factors whatsoever, have you? A. No, sir.

10,051 Q. In your opinion would it be appropriate to determine the value of a neighborhood theater here in Georgetown or in Princeton by comparing it with a control group that consisted of theaters in downtown Washington, New York, Chicago, and Los Angeles?

A. I would like to hear the early part of that question again, please.

(Question read:)

THE WITNESS: Yes, sir.

BY MR. GATES:

Q. And you would have no reticence about constructing the net income before taxes and the constructive value of a motion picture theater in Georgetown or Princeton by using as a control group these major theaters in these large cities that I have mentioned?

A. I would certainly be willing to use them as a control group, sir. But to allow myself to stop there is inappropriate, because it would indicate that there is no judgment that is necessary in this whole matter.

Q. What adjustment would you make?

A. I didn't say "adjustment, sir. I said "judgment.

Q. Oh, I beg your pardon.

Well, what factors would you consider in this judgment that you are going to exercise?

10,052 A. I can't answer because I don't know the hypothetical problem well enough to answer.

Q. But it is true, as I understand your testimony, that you would not stop by taking the steps only that you took in this case?

A. That's correct, sir, and the analogy isn't proper, either, because the very part of this --

MR. GATES: Just a minute.

Your Honor, this is a volunteered statement of this witness. I think he answered the question, and I think there is no requirement to volunteer anything.

THE COURT: Do you want to explain your answer?

THE WITNESS: Well, sir, I consider an explanation in order.

THE COURT: Well, give him a chance to explain it, and see what he says.

THE WITNESS: The reason that it is not proper is that the evaluation we have made has as its very basis the assumption that Riss & Company did follow the average.

10,329 MR. GATES:

Q. Did you answer the question? A. 2.7, sir.

Q. Did you work out the constructive 1957 net income for Riss & Company, starting with a 1948-1949 base period? A. No, sir.

Q. How did you happen to select the years 1949-1950? Were you told to use those years by Riss & Company? A. No, sir.

Q. You readily could work out the constructive net income predicated upon a 1948-1949 base period, could you not?

10,330 A. It could be done.

Q. What additional information would you need?

A. We would need the data for 1948, such as shown on these exhibits, I believe the figures we would need for both the control group, as you mentioned, as you call it, and as for Riss, the operating revenues -- their net profit before taxes -- yes, that is it.

DEPUTY CLERK: No. 3 Defendant, TEA exhibit 5045 for identification.

(No. 3 Defendant, TEA Exhibit No. 5045 "Table No. H, Revision of Table No. 1 (Base Years 1948-49) Operating Revenues, Intercity Carriers of General Freight with operating revenues of $200,000 or more, and Riss & Co. commencing 1948 ending 1949, was marked for identification.

TEA Exhibit No. 5046, photostatic copy of Trinc's Red Book for 1950 marked for identification.)

MR. GATES: Your Honor, with respect to TEA exhibit 5046 for identification, this is a photostatic copy of some of the pages of Trinc's Red Book for 1950. There is attached to the photostatic copy of the affidavit of Archie Raub, who is president of Trinc's Association. I suppose, perhaps, I had better show it to your Honor.

THE COURT: Have you shown it to the other side?

MR. GATES: Here is a copy.

10,331 MR. WRIGHT: We had not seen this. We have offered in evidence, and we still offer this 235 which had the Trinc's data for 1953-57 in it. It was objected to on the ground that it was not reliable, the data was not reliable.

Now, I have no objection to any use of Trinc's data provided we can have it all. If he is going to use it, if he is going to try and use just a few parts of Trinc's here that he thinks are helpful to him, I do not see any reason why we should not have it all in here.

* * *

10,338 Q. I would just like to have you follow along, if you will:

Now, you used Form A, and you used Trinc's, did you not, in the preparation of your Exhibit 249 for identification? A. Yes, sir.

Q. Now --

A. May I clarify one thing: When you say "form A, you have said it many times, I am correct in believing by that, that you mean the I. C. C. reports, or reports submitted to the I. C. C. ?

THE COURT: There has been no dispute about that. The Form A's have to do with the I. C. C. Reports.

MR. GATES: There's no question about that.

THE WITNESS: All right, sir. Yes, sir.

BY Mr. GATES:

Q. And the only Form A's in total, that is, completed, that you used, were those of Riss & Company. You didn't have the complete Form A's for any other carrier? A. That's right.

Q. Now, in order to go through the computation which you did, the first thing you have to do is to compute the operating revenues or the average of the operating revenues for the year 1948, and the year 1949. Is that not correct?

10,339 A. Yes, sir.

Q. Now, by reference to TEA's Exhibit 5045 for identification, is it not correct that the 1940 income was $8,640,000.00 and the 1949 -- excuse me, operating revenues, $8,640,000.00, and $13,740,000.00?

A. Sir, you must be reading from another report. Are you talking about Riss' revenues, or the intercity carriers?

Q. Riss' operating revenues.

A. Oh, I beg your pardon. Would you read those figures again? I was looking at the wrong column.

Q. All right: The operating revenues of Riss & Company for 1948 were $8,640,000.00, roughly. A. Yes, sir.

Q. And for the succeeding year, $13,740,000, in round figures?

A. Yes, sir.

Q. Now, that means an average of $11,200,000.00; is that correct?

A. Sounds about right.

Q. Now, how would you derive from that figure the constructive operating revenue of Riss for the year 1957?

A. Well, using these figures as I have had them presented to
10,340 me, I would do this:

This exhibit shows that the inter-city carriers in 1957 had operating revenues equal to approximately 249 per cent of their operating revenues in the year 1948 and 1949 on an average. So, application of that percentage of 249 per cent to Riss & Company's operating revenues of 1948-1949 would yield this constructive operating revenue. I presume you have that worked out, if it is not shown here.

Q. That's right. Would you accept my statement subject to your check, that using the 249.44 index, which is developed on TEA's Exhibit 5045, the constructive income, operating income of Riss & Company for the year 1957, would have been $27,937,000.00?

A. Yes, sir.

Q. Now, that is compared to the $33,124,000.00 that you got if you used the 1949-1950 base period. Isn't that right? A. Yes, sir.

Q. Now, you can from those figures, can you not, compute the net income before taxes constructively?

A. I would have to have more than --

Q. You can determine first the profit margin before taxes to Riss & Company, can you not?

A. Well, not on the basis of what I have here, no, sir.

Q. For the years 1948 and '49, you cannot?

10.341 A. No, sir. All I have here is the operating revenues.

Q. What do you need? We have got it all here.

A. They had net profit before tax.

Q. Of Riss & Company for the year 1948; is that right?

A. Yes, sir, we need it for 1949, also.

Q. You have that on your own table, do you not?

A. Yes, sir. We need the 1948 profit before tax of the control group, too.

Q. All right. Well, in order to save time, Mr. Meyers, let me give you some figures, and you can check them overnight, if you like:

The 1948 income before tax of Riss & Company was $277,000.00, and the 1948 net income before taxes of all of the Class I carriers of general freight, of $200,000.00 or more, was $72,235,000.00.

Now, from that, is it not correct that Riss' 1948 profit margin was 3.21 per cent? That is derived by dividing the operating revenue into the net profit before taxes?

A. What year, sir?

Q. 1948.

A. What was your figure, sir?

10,342 Q. 3.21 per cent.

A. That sounds about right.

Q. And the profit margin as shown by your exhibit 253 for 1949 was 2.76 in round figures, was it not?

A. I have forgotten, sir, but I will take your word for it.

Q. The average, then, would be 2.98, would it not?

A. Yes, sir.

Q. Now, again, will you accept my statement, subject to check, that the 1948 profit margin before taxes of all inter-city carriers of general freight with gross revenues of $200,000.00 or more was 6.795 per cent, of 6.8 per cent?

A. Yes, sir.

Q. Now, referring again to your Exhibit 253, which is your table, the 1949 profit margin of those carriers was 4.9, was it not?

A. I will take your word for it, sir.

Q. So the 1948-1949 average would be 5.85, would it not?

A. I think that's right.

Q. Now, if you compare all the carriers with Riss you can see, can't you, that Riss' profit margin for the 1948-1949 period was 2.87 less than the whole group. Is that right?

A. Yes, sir.

10,343 Q. Now, would you look at Exhibit 253 -- or maybe you recall it -- where the 1957 profit margin of the group was 2.89?

A. I recall the figure.

Q. That's right, is it?

A. Yes, sir.

Q. So, applying your method to constructive 1957 profit margin before taxes to Riss, would be determined by subtracting 2.87 from the 1957 profit margin of the larger group, which was 2.89, wouldn't you?

A. Yes, sir.

Q. And this would yield a constructive profit margin of Riss of point 02 per cent, would it not?

A. Yes, sir.

Q. Now, can you tell me in this way what would be the constructive 1957 net profit before taxes of Riss & Company?

A. I can, sir, if you will repeat to me the constructive operating revenue figure which I don't have taken down?

Q. The constructive operating revenue figure was $27,937,000.00

A. I have to know for the decimal points.

Q. Isn't it between $5,500.00 and $5,600.00?

A. Yes, sir.

Q. And the constructive value of Riss & Company, using your

10,344 price-earnings ratio of 5.5, is how much?

A. $30,000.00

Q. Now, we have reached that result by using your method, and your sources, and doing nothing more than changing the base period, didn't we?

A. I guess that's right, yes, sir.

Q. So the base period makes the difference in constructive value between $30,000.00 and $3,461,000.00, doesn't it?

A. I think it's a great over-simplification, but doing it the way you have done it, yes, that's right.

ARGUMENT BY MR. SHEA ON BEHALF OF ATLANTIC COASTLINE

* * *

10516 Now, your Honor, may I take you through that document and see whether it can carry any such burden as this? On top is the Kerr letter to Fitzpatrick, Dana, Kelly, "As information, I enclose a copy of my confidential letter of this date addressed to Members of Our Executive Committee, attached to which is a copy of the memorandum I made covering conference of government traffic representatives in Washington, March 10, 1950. For obvious reasons I had considerable hesitancy putting down in writing what transpired at the conference, but I finally came to the conclusion that the situation is becoming so serious it should be immediately brought to the attention of my principals, and this was the only convenient way of doing so. You will note that I suggested

10517 for their consideration that the time may have come for discussion at top levels with a view of obtaining for the railroads a proper share of the available traffic of the Defense Establishment."

Then we go over to the memorandum, your Honor. I would like to go through it with some care.

THE COURT: Well, I have been through it. I have read it.

* * *

10521-22 But, even supposing this had come, so that there is no showing that this came to the top management of the company, but even assuming this had come to the top management of the company, your Honor, suppose this had come to Mr. Davis. Will you think of yourself in his shoes? If this had come to you, I appreciate your Honor, your experience, you are experienced in matters of large affairs and what is involved in a large transportation company, if this

10523 had come to you as president of Coastline, would you have said, "Now, clearly this shows that Kerr has entered into a nationwide conspiracy with all the rail munitions carriers in the country, it establishes that, it establishes that Kerr has agreed upon behalf of Coastline to participate in this conspiracy, and Kerr has shown that, acting for Coastline, he has committed an overt Act in carrying out that conspiracy?"

Can you imagine your Honor sitting down and writing to every first class railroad in the country and to Kerr, saying I have this memorandum now, and it shows that all of you have entered into a conspiracy to monopolize munitions traffic.

I just want you to know that Kerr did not have any authority to commit me to that. I want to know, I want you to know that Kerr was not agreeing on behalf of Coastline to that.

I want you to know that there was no overt act committed here by Kerr on behalf of Coastline.

Your Honor, can you just imagine that being done? This is fantastic. I mean, in the first place, this probably would never have reached the desk of top management. In the second place, if it did, it would never occur to top management that this could be interpreted as establishing a country-wide conspiracy against truckers and establishing participation by Coastline in that
10524 conspiracy.

ARGUMENT OF MR. AILES FOR ASSOCIATION OF AMERICAN RAILROADS

* * *

10569 Now, the next document is the Kerr letter about which your Honor had some discussion with Mr. Shea. I would like to point out, as a resident of this town, I am sure your Honor is thoroughly familiar with the fact, that industry groups are forever appearing before the government, explaining to the government the collateral reasons why the government should patronize their particular industry more than they do. I myself know I have worked on materials arguing that certain types of airfreight carriers should be patronized by the Government because they buy planes which will be available in time of emergency.

Now, what Mr. Kerr and his group were doing in a meeting that was not called for this purpose but got around to it, was exactly the same thing. They were simply talking about the railroads carrying 90 per cent of your traffic in wartime and ought to carry 90 per cent in peacetime.

Of course, 90 per cent is just a rough figure. We think you should patronize us more than you do.

Now, bear in mind, your Honor, that a monopolization of an industry involves such control over it that you can raise prices and reduce service without losing it. By definition, that is what it is.

The Kerr memorandum makes it perfectly clear that they do not argue with the government that it is all right for the Government to ship by truck because whenever the truck rates are lower, they say he reports the
10,570 Government representatives said that sometimes the truck rates are lower.

Of course, under our policy of shipping with them, they say -- we argued while recognizing the feeling they had about the lower rates-- nevertheless they should think about the over-all situation.

Now, the sentence Mr. Wright also quotes is taken out of context out of that memorandum, the one that says we ought to get 90 per cent regardless of the rates.

That sentence read in the light of the rest of the situation. It is based on the assumption the trucks are not undercutting the railroads on 10 per cent of the total traffic but something less.

He says in the 9010 arrangement, our rate should include traffic where we are lower as well as where we are the same, and the ten should include it where they are lower as well as the same.

In any event, this is a peculiar case. That letter has nothing to do with explosives traffic. There is one reference to explosives in there. That is when the navy man brought up something about what was happening at Crane and he pointed out the railroads were going to lose it all because they refused to cut rates to meet truck competition and that because it was safer to go by rail,
10571 they would rather be shipping it there but they were unable to. That is the extent of the explosives business.

I would like to point out the date of that letter is March 10, 1950, for weeks sitting back here it has been plaintiff's exhibit 214, which has the bar charts on it.

This vicious act of Mr. Kerr and these other people took place three and a half years before plaintiff has his peak season as an explosives carrier. March 10, 1950--and his big month was December of 1953. This was a long time later, as these things go.

* * *

MOTION FOR DIRECTED VERDICT

BY MR. GATES

* * *

10657 From that point the plaintiff proceeds to a discussion of what is known in this case as Plaintiff's Exhibit 40, which is the famous Kerr memorandum of March 10th, 1950. He calls that the "foundation document."

10658 Now, Mr. Layne and Mr. Wright interpret that document and say the purpose is to obtain for the railroads at least 90 per cent of the Government munitions traffic, and I underline the word "munitions."

I think, if the Court please, that we ought to pause a moment and analyze that letter. I know it has been talked about a great deal. Perhaps others of my colleagues have somewhat different interpretations, but I would like, if I might, to give Your Honor the benefit of my own ideas on it.

THE COURT: Can you gather from the four corners of this document, Plaintiff's Exhibit 40 -- can you gather any facts or interpret any statements in there to coincide with the plaintiff's theory of the case?

MR. GATES: I cannot.

THE COURT: You can see nothing in there that could support the plaintiff's position or theory?

MR. GATES: I would like, if I might, to take two or three minutes to analyze the letter, as I see it, to show you why I can't.

THE COURT: All right.

MR. GATES: Now, in the first place, let's remember that that letter reflects a meeting which was called by a Government official, Mr. Hague, of the General Services Administration.

10659 Why was it called? It was called because Mr. Hague felt he had been subjected to criticism, apparently, by the Comptroller General, that the Section 22 rates quoted by the railroads were not applicable from Government Department to Government Department, or Agency to Agency.

If you quoted a rate for the Department of Agriculture for the movement of flour, when the Army wanted to move flour you had to have a different quotation.

And the railroad representatives pointed out during that meeting that by reason of the differences in circumstances you might have to have a different rate; if you had to move it with a great hurry in one case, and you didn't in another -- expedited treatment against non-expedited treatment; what the loading

and handling facilities might be from case to case.

Now, that was the purpose of the meeting.

They then got into a discussion, so the memorandum says, as to why more Government traffic did not move by rail, and if Your Honor will look at page 2, I think it is, of the memorandum, you will see that there is a discussion of the National Transportation Policy as reflected in the Transportation Act. And that policy requires that in the administration of the Transportation Act you shall endeavor to preserve the inherent advantages that one means of transportation has as against another, and in connection with that discussion the railroads suggest that 90 per cent of Government property -- and this is all Government property, Your Honor, not just munitions -- that all Government property ought to move by rail.

10660 THE COURT: Instead of less than 70 per cent.

MR. GATES: Yes.

Well, I am going to come to that in just a moment, Your Honor.

THE COURT: All right.

MR. GATES: Now this, as I interpret it, is the natural play of competitive forces.

Here the Government asks the railroads for a concession: "We want you to make these quotations applicable to all Government property."

And the railroads say, "All right, we are willing to talk to you about that, but we want something on our side."

It is as though you, a shipper, came to me, a rail man, and said, "Mr. Gates, I want a lower rate," and I say, "Well, that's fine, Your Honor, but how much are you going to give me in the way of shipments?"

This happens in all forms of transportation. If you want better service from the railroad, the railroad says, "All right, what are you going to give me in return for this better service?"

10661 Maybe it is just your business, or maybe it's more of your business.

And they were asking for more business, just as the truckers had done.

And I invite Your Honor's attention to the paragraph that begins at the bottom of page 2, and this very significant language appears:

"The traffic departments are being deluged with communications from Congressmen and Senators, and much time is spent in explaining why particular truckers have not been given any, or more, traffic."

"Or more traffic.

In other words, the truckers have been going to their Congressme asking their Congressmen to put the heat on the traffic departments of the Army and Navy for more business.

And then this language follows:

"This pressure is undoubtedly one of the major causes of the truckers receiving such a large share of the available traffic."

I think it must be recognized, if the Court please -- in fact, historicall -- that the railroads carried more than 90 per cent of the Government munitions traffic.

I think the Reparations Cases indicate that during the war the railroads were carrying between 95 and 97 per cent.

10662 THE COURT: That was before, say, 1950, wasn't it?

MR. GATES: That's right. Maybe even as far back as 1946. There were a combination of reasons why this was true.

But commencing after the war, when trucks could be produced for civilian use, there was no restriction on tires and gasoline, so the trucking business began to increase.

The railroads knew they had been carrying this amount of business and they saw they were losing it.

It is certainly not a sinister motive to go to one of your large shippers and say, "Look, my friend, we have been handling your business for years and years. What is the matter? Why should you be going over to my competitor?"

And this, in effect, is what the railroads were saying.

* * *

10667 THE COURT: Well, let me ask you this:

Let's take the first page -- I don't mean to interrupt you --

MR. GATES: It's all right, Your Honor. It doesn't bother me a b

THE COURT: You are so well versed in this subject matter
10668 that a lot of times, naturally, I forget some of these things unless I have -- I might have to ask your assistance to call it to my mind.

Let's take the first page here. Do you have it?

MR. GATES: I have it here, yes, Your Honor.

THE COURT: I have a photostatic copy of this, March 13, 1950. It's marked on top, "Confidential."

"Sent to Fitzpatrick, Danner, Mr. Kelly.

"Gentlemen:

"As information, I enclose copy of my confidential letter of this date addressed to members of our Executive Committee, attached to which is a copy, a copy of a memorandum I made covering conference with Government traffic representative in Washington on March 10, 1950."

It says:

"For obvious reasons I had considerable hesitancy putting down in writing what transpired at the conference."

Well, what were the obvious reasons? Why did he hesitate putting down in writing? Is there anything secret about this?

MR. GATES: In my view, no.

THE COURT: Well, why does he use that language then? I mean, what interpretation can you put on that?
10669 I mean, that's what I am talking about. What inference might I derive from that statement?

Was there something going on that he didn't think was entirely proper, or was there something going on he didn't want everybody to know about it? Or maybe you can draw the other inference, that it's none of anybody's business, that it is what he should have done.

That is where we get into this situation of where reasonable people might disagree.

MR. GATES: I would be very happy to try to answer your question.

THE COURT: What do you construe this to mean? What was so confidential about this thing?

MR. GATES: As Your Honor knows, I have spent considerable time in Government service myself, as well as being in private practice.

I am going to try to answer it on the basis of sitting on either side of the fence.

THE COURT: All right.

10670 MR. GATES: When you get into a situation of this kind where a carrier -- and I represent Airlines as well as railroads -- wants something from the Government which is competitive with another field of transporation, the thing that you guard most carefully is that that other form of transportation shall not know what you are doing. This happens within a single field of industry.

I will give you an example which lent itself to another case in which Mr. Ailes and I were involved, this time on opposite sides of the situation. In 1946 American Airlines decided it was going to go into the contract carriage as distinguished from common carriage for freight.

I can tell your Honor, from my own personal knowledge, that there are only three people within the company, outside of the lawyers, who do the contracts, that knew that this was going to be done, because it was such a highly competitive thing. They did not want TWA, or Slick, or anybody else to know what they were up to until it was fairly well complete.

When you go into a government agency to talk and say, we want such-and-such concessions, or we want this part of the business, you certainly do not want the trucker or the bargeline, or whatever it may be, in there until you have persuaded--

10671 THE COURT: Now, he was not writing to the truckers. He was writing his own people.

MR. GATES: That is right. But he does not want a memorandum circulating around in the railroad industry which can so easily fall into the hands of the opposition.

THE COURT: That is your interpretation.

MR. GATES: That is my interpretation, yes. I do not have any doubt that had I been in that kind of situation, I might not have had the confidence, but I would have said I think for obvious reasons this should not be circulated outside of the railroad circles: And that is certainly the way I have interpreted the letter from the outset.

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MOTION FOR DIRECTED VERDICT

BY MR. MCKAY

* * *

10763 Now, I call to your attention that this Kerr document shows specifically that Kerr was not asking for government traffic where the truckers had a better or a lower price.

He says--that appears next to the last full paragraph on page 2--he calls attention to the fact that the agencies might deem it their duty to ship by motor freight where the rates are less.

In other words, he addresses his letter exactly to those situations where the motor rates are as high or higher than the rail rates, and then seeks to address his argument--in other words, specifically he is not asking that they be considered irrespective of the rate level, which is the twist Plaintiff seeks to give, but the letter just does not support it.

The letter says that at that time we recognize that you have a duty to ship where the rates are lower by truck. We are not challenging that. We are taking the considerations where the rates are equal or the motor truck is

10764 higher.

In other words, the very language, that is in the Kerr letter rebuts the claimed intention, to us means other than a rate cut to obtain this business.

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MOTION FOR DIRECTED VERDICT

BY MR. WHEELER

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10765 THE COURT: Well, now, let me ask you, Mr. Ball, the same question I asked Mr. Gates, or practically the same.

If there was not anything you might say to conceal that they could have published in the world or anything like that, why the first page of the covering letter--

MR. BALL: I wanted to come to that, because I had it in our memo. There is a very simple and obvious explanation.

THE COURT: Maybe you have the explanation.

MR. BALL: Yes, I think this is pretty clever.

THE COURT: Mr. Gates gave his explanation.

MR. BALL: Yes.

I mentioned this in our memorandum to the Court.

If you will notice the Kerr memo, it says:

"I think this has come to the point where we must go higher up, we must go over the heads of these boys and talk at the top level."

10766 Now, if there was anybody who has anything to do with purchasing goods or going to a buyer, you know that if it ever got back to the buyer that you were contemplating going over his head to his boss, that you just cut your throat in future dealings.

The obvious thing, if you will look at the context here, he has reference to the hesitation to put down the thought that it is now time to go to the higherups.

The thing he obviously wants to keep confidential is avoiding going back to these men with whom he has to deal day after day on the mechanics of handling rate quotations.

My gosh, his respect for them is that he would go over their heads. That is the kind of thing you do every day in business.

If I were going to--as a salesman--having written my boss and said I can't get anywhere with the buyer, I think we should contemplate going to the top level, I would say "For Pete's sake, don't let the fellow know about it until we decide whether that is the thing to do."

Because, the very fact that you contemplate that just kills you in

future dealings there. To me, that was the most obvious thing about this whole letter.

10767 That certainly fully explains the reasoning.

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MOTION FOR DIRECTED VERDICT

BY MR. BALL.

* * *

Now, if you will notice this meeting was called by the government to discuss specific things that were within the jurisdiction of these rates. The meeting was called to discuss the form and content of Section 22 quotations to be filed with the government, and the whole first part of it, the part upon which the government had called the meeting dealt with that matter of the form and content of the filing of rate quotations, or rate offers.

10768 Now, that, you see, was specifically within the scope of the authority of the rate bureaus. They were the ones who prepared and filed these. And so they were down on a proper purpose.

Then suddenly Mr. Kerr, for some reason or other, interjects a problem which is outside the authority of all of them. There is no showing that the others had formulated the same idea. There was no showing they had any need to stop him because this was not their business. That, in the very beginning, breaks it off.

What we have here is just one man. There are literally tens of thousands of railroad officials in the thousand or more railroads and the numerous associations of railroads and rate bureaus throughout this country. Here is one out of 10,000 or more who happened to speak on a matter which was not his business, and express something that was in his head, and if that which was in his head was wrong, you cannot attack or charge an industry with what one man has in his head.

Now, it just about reduces itself to that. If he had been delegated by anyone to formulate that kind of a position or policy, that would be something else. But there is not the slightest evidence inside or outside the document, itself.

10769 He uses the word "we", if the Court please. But that is his report, and you cannot tell whether that is an editorial "we" or not.

He also uses the word "I" and the context was that this was Kerr's baby. You just cannot tax an industry with a record that one man made when he got on his horse and took advantage of an opportunity to express a policy for the railroads which he was not charged with formulating.

Out of Presence of Jury:

THE COURT: Mr. Gates.

11,161 MR. GATES: If your Honor please, I have read your Honor's opinion in connection with the motion to dismiss, and I note the last paragraph your Honor has ruled that all exhibits entered by the Plaintiff are to be considered by the jury as against all defendants.

On behalf of TEA, I should like specifically to object to the admission of certain documents which have been given numbers in this proceeding on the ground that there is no evidence of any kind whatsoever connecting TEA with the alleged conspiracy; and that these documents do not and can not be considered the acts or declarations of TEA. I refer specifically to exhibit 105 which is the
11,162 transcript of the proceedings in the Reparations Case, to which TEA was in no sense a party. A proceeding which antedates the alleged conspiracy complained of by the plaintiff in this proceeding, by three or four years. That exhibit 105 and certain subsequent serial letters, exhibits 188 and 189 and 190, which are charts showing the relationships between the members of the various associations, are largely based upon interrogatories, and it is my understanding if the Court please, that answers to interrogatories can never be made binding upon another party. They are binding only upon the party who makes the answers to the interrogatories.

That includes exhibits 208, 209, 209-A, B and C and Exhibit 223-A and 224, and then these drafts which have been prepared to show the movements of explosives, exhibits 257 through 283 inclusive.

THE COURT: All right, Mr. Rhoads

MR. RHOADS: Your Honor pleases, may I also join in the specific objections which just have been made by Mr. Gates on behalf of TEA adding thereto exhibit 189-A and 189-B which I am not quite sure Mr. Gates included in his specific objections.

MR. GATES: They should have been.

MR. RHOADS: And furthermore, I would like to add the further reason, sir, that these exhibits could not under any circumstance be considered
11,163 declarations made in furtherance or pursuant to the alleged conspiracy. I think that is what was implicit in Mr. Gates objection. But I should like to add to what he has said.

MR. PIERPOINT: Your Honor--

THE COURT: I will say, I take it all counsel will be given the benefit of these objections, filed by all defendants.

MR. PIERPOINT: I would like to add a few more exhibits. I would like to read into the record that those exhibits with respect to which the defendant Byoir objects on the grounds that they are not declarations in the furtherance of a conspiracy, and therefore, under no circumstance are binding on Byoir.

Exhibits 40-P, P-63, P-105, P-132, P-135, P-188, P-189, P-189-A, P-189-B, P-190, P-194, P-195, P-208, P-209, P-209-A, P-209-B, P-209-C, P-223, P-223-A, P-224 and P-257 through P-283.

THE COURT: Mr. McGlothlin.

MR. McGLOTHLIN: Your Honor please, I regret to say I do not have my list made out. I would like your Honor's indulgence to file it with the clerk tomorrow or next day.

THE COURT: Counsel will have that right.

MR. McGLOTHLIN: We object on the ground that even although the conspiracy is assumed, these documents remain inadmissible against one or more of my clients.

11,164 THE COURT: Mr. Wright, do you have anything to say in reply?

MR. WRIGHT: Not at this time.

THE COURT: You still offer all exhibits?

MR. WRIGHT: Yes, sir.

THE COURT: Against all defendants?

MR. WRIGHT: Yes, sir.

THE COURT: You make the offer when the jury takes their

seats in the jury box.

MR. WRIGHT: Yes.

THE COURT: Mr. Shea.

MR. SHEA: Your Honor, I object to all of these exhibits and state with specific reference to the exhibits the basis of my objection.

They are two-fold, stated in general terms, one which has been already stated, i. e., at the outside the only documents which are admissible are those which were acts in furtherance of a conspiracy, and which has not come within any such definition.

Secondly, the objection states that in any event the documents would be admissible even though they were in the nature of acts in furtherance of a conspiracy only to the extent that they fell within the compass of the conspiracy as understood by a particular defendant. In consequence, it would seem to me that a much more discriminating test needs to be applied to admission of all documents.

11,165 THE COURT: All right. The objection is overruled.

Mr. Ball?

MR. BALL: When we filed the various objections to documents which we filed, we filed most of them in the shape to meet this issue as well as the immediate issue that was confronting us at the time. I assume that the reasons we stated in our objections to these documents are considered as applicable to the ruling here.

THE COURT: That will be considered, yes.

* * *

DIRECT EXAMINATION OF MR. BURGESS

BY MR. GATES

* * *

11202 Q. How does a rate get before a conference, Mr. Burgess?

Or a proposed rate, perhaps I should say that.

A. Well, it comes before the conference in the form of what is called a "proposal".

Q. Who makes that?

A. Proposals are made either by shippers, very, very generally by shippers or they may be made by a member railroad itself.

Ordinarily, a member railroad in making the proposal is doing so because some shipper has urged him to present the proposal to the conference.

11203 These proposals, when they come to the conference, before the committee, either from a railroad or from a shipper, are publicized, that is, public notice is given in a traffic publication that has wide circulation among all industry and railroads, which publicizes the fact that a certain proposal has been presented and that it will be considered by the committee at a certain specified meeting, giving the date of the meeting.

The purpose of that notice is to inform the shipping public what is being proposed so that the shipper, any shipper who is interested can come to the conference and present his views to all the railroads at that one place.

Q. Are these proposals generally for rate increases or rate reductio or both?

A. Well, very generally, and almost entirely for rate reductions.

There are occasions when general increases in rates are necessary, as has been mentioned in these so-called Ex Parte cases, where because of a general increase in wages or costs of materials, the cost of running a railroad everywhere has increased, it is necessary for the railroads to go to the Interstate Commerce Commission and ask authority to make a general across-the-board increase.

And now, those cases are rather few compared with the reductions. In fact, in railroading the common expression is that the percentage of proposals that come before rate conferences for reductions is the so-called

11204 Ivory Soap percentage of about 99-44/100ths.

Q. Mr. Burgess, after a proposal has been made and I assume docketed on the agenda of the rate conference, and the notice has been given to the public, what happens to it, then?

A. Well, on the day named in the notice for the meeting, the members of that rate conference come together at the headquarters of the conference, and for the Eastern Lines that is, maybe New York or it may be Buffalo, or it may be Chicago, generally.

Q. Is there any study made of proposal by the rate association, itself?

A. Yes, there is. The rate association has the assistance, that is, these members from each railroad have at the headquarters of the committee a group of employees called a study group. The purpose of that study group is, it consists of four or five people, to make studies, to make investigations of the proposal that is presented, to study the why and wherefore of it, to analyze the proposal to see whether it would work up to the requirement or measure up to the requirement of being just and reasonable under the Commerce Act, whether it would be free from discrimination, whether it would be free from preference and prejudice, what the commodity is, what its value is, how it would affect
11,205 other rates, and a great many factors that are involved in making or changing a rate. Those are all studied by this study group, and that group makes a report to each member line.

So that the representative of each railroad who comes to the meeting has the benefit of this impartial study that is made by the study group.

Q. Now, at this meeting, are shippers entitled to appear?

A. Yes, they have the right to appear under the arrangement under which a rate conference, or rate conferences exist today, which is an arrangement that has been approved by the Interstate Commerce Commission, a shipper has a right to come in and present his views--or if he does not want to come in, he has the right to submit a written memorandum.

They do it both ways, depending on how the shipper wants to act.

Q. They can present their views orally or in writing, to use an example, to the TEA.

A. Right.

Q. What happens after the views of the shippers and of the various railroads have been heard at this meeting?

A. The members of the committee discuss it among themselves, and the discussions are very general, and they finally reach a conclusion by voting, which is an expression of their individual views.

11,206 Each member, each representative of each road--and there is only one--expresses his views about it. If they reach a unanimous conclusion that certain changes should be made or should not be made on the proposal, that conclusion again is publicized.

Q. Where is it publicized?

A. Well, in the east it is called the Traffic World which is a traffic publication of wide circulation among all shippers and chambers of commerce and commercial organizations.

Q. If all of the members of the rate bureau agree, does the rate then become published as a tariff filed with the ICC?

A. Yes, if there is no objection by any member, it is then publicized --it is then published in a tariff and filed with the Interstate Commerce Commissie and there again under the law the tariff cannot go into effect until 30 days after it is filed, unless the Commission for good cause, some urgency, allows it to go into effect on shorter notice.

* * *

11,221 Q. You mentioned a moment ago that the Commission had fixed maximum rates, I think you called it, although I am not sure that I made a mental note of it, but what did you mean by that expression?

A. Well, it is a rate that marks the upper limit to which the legal rate may be fixed.

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11222 Q. I think you had better describe a little more fully, then, Class Rates:

How many classes are there?

A. Well, at the present time there are 30 classes -- classifications.

I should have said a while ago, that in addition to being required to publish and maintain reasonable and just rates, the law also says that the

11223 railroads shall formulate and maintain a reasonable classification of rates.

"Classification" means simply a grouping together in one group of a great number of articles of commerce that have similar transportation conditions, substantially the same in value; they have substantially the same weight density, that is, their weight is in relation to their bulk, they have the same weight, they move in substantially the same type of containers or packages; and, rather than publish a separate rate on each one of those commodities, from the very beginning of railroads and from the very beginning of regulation in 1887, it has been necessary for the railroads to classify or group the articles together that are similar from a transportation standpoint, and apply one rate, called a Class Rate, on everything that is in that group or class.

There are thousands of articles that fall in those classes, and the classes range from Class 1 down.

Let's say there are 30 classes, and the other classes are called -- the base class is called First Class and then you have classes ranging down below that called Second, Third, and so forth.

The First Class Rate is considered 100, or 100 per cent. For example, the Third Class rate, I believe, is 85 per cent of First Class. That means that articles of a lower grade are put in that Third Class and they take rates 85 per cent of First Class.

11224 Now, there are some articles that are of very high value and high quality that fall in classes above First Class, and today, the classes run

up to four times First Class. That is in railroad traffic circles called Class 400; means it is four times the 100 per cent class, or the First Class.

And the Commission made a rate that applied to each of those 30 classes, and those are the Class Rates.

Now, in addition to the commodities that fall within those prescribed groups there are commodities that don't really belong in any one of those groups. They have so many special characteristics.

For instance, coal. Coal is a commodity that wouldn't logically fall in any one of the classes, in handling open-top equipment, whereas merchandise traffic requires closed cars.

So, where you have a special commodity that has so many unique and special characteristics about it as to keep it out of any one of the standard groups or classes, a special rate is applied and made for that commodity and it is called a Commodity Rate. It applies only to that commodity.

Q. Is ammunition and explosives moved under a Class Rate or a

11,225 Special Commodity Rate?

A. Well, they move under a rate, or did when I was familiar with it -- under a rate made a certain percentage of the First Class rate.

That would be a commodity rate.

* * *

11272 Q. You just mentioned section 5-A of the Interstate Commerce Act. Are you familiar with what are called 5-A Agreements?

11273 A. Yes, I am.

Q. Did you have anything to do with the preparation of any of the so-called 5-A agreements?

A. Yes. The Eastern Lines Agreement, I was Chairman of the law committee that drafted it after that section of the law was passed, and also of the committee that presented it to the Interstate Commerce Commission when it held a hearing on the agreement to determine whether it was the kind of agreement that the law said the Commission should approve.

Q. Mr. Burgess, in the preparation of the 5-A Agreement for Eastern Railroads, did you have occasion to collaborate with representatives of the Western Railroads or the Southern Railroads in the preparation of agreements which they drew for their respective territories?

A. Yes, there was a great deal of collaboration and conferring among counsel and traffic officers, because this was a new provision of the law and it was passed by Congress in June, 1948.

It authorized the railroads to enter into agreements for the organization and operation of these conferences, if the agreements were approved by the ICC. Of course those requirements as to agreements applied to all railroads throughout the whole country, and naturally we wanted to be sure that when we proceeded, that we were interpreting the Act the same way and pre-
11,274 senting to the Commission the kind of agreements that the law said could be approved.

There was a great deal of collaboration in order to arrive at the type of agreement that the Commission would approve.

Q. Now, would you sketch for us briefly the background leading up to these 5-A agreements?

A. Well, I have already explained how it met the request of the government, this Chairman's Committee existed during the war, and operated with the consent and approval of the Anti-trust Division of the Department of Justice.

When the war ended, of course that approval terminated. At that time the Antitrust Division was raising questions as to whether or not this collaboration and cooperation between railroads with respect to rate-making, which had been carried on ever since 1900 and had the Commission's approval and the approval of everybody else, was nevertheless price-fixing. That raised a question that cast doubt on the continued functioning of these great rate conferences. In order to clarify the situation and find out what the public policy of the nation was going to be about their continuance, a law or a bill was introduced in Congress. It took the name of the Reed Bulwinkle Bill.

That law or bill provided that conferences that were provided for in agreements
11,275 between railroads, which agreements in turn were approved by the Commission, could lawfully continue without fear of any antitrust prosecution.

Both Houses of Congress, both on the Senate side and on the House Side, held very, very extended hearings on it. There were many, many witnesses--several hundred. The witnesses came from all over departments of the government, from the Interstate Commerce Commission, from the Office of Defense Transportation, the National Industrial Traffic League, and the Organization of the State Public Service Commissions.

I neglected to state while ago that in addition to being regulated by the Federal Government through the Interstate Commerce Commission, the railroad sent trucks which are also regulated by every state in which they operate. The State Regulatory Body is called a Public Utility Commission or a Public Service Commission.

Those State Commissions have a national organization called the National Organization of Railroad and Utility Commissioners. That Commission sent witnesses to Washington to testify in support of this Reed-Bulwinkle Bill, urging Congress to pass it. In fact, the witnesses who appeared were unanimously in favor of continued the rate conferences, told the Congressional committees in the many different ways in which they were
11,276 necessary, and the business of railroading could not be conducted without them. No shipper in the entire country testified against the bill.

The Department of Justice, which, of course, is not a shipper, did continue to question it. There was one telegram from a Governor of Georgia, expressing disapproval but sending no witnesses to explain why.

Otherwise than that, it was a unanimous request from the public and agencies of government that Congress approve this Bulwinkle bill, and Congress did pass it, in June 1948. At that time the bill became law. It was passed as an amendment to the Interstate Commerce Act, and went into that Act as Section 5-A.

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DIRECT EXAMINATION OF MR. BURGESS

BY MR. WRIGHT

* * *

11,310 A. That is, your question is whether the Presidents' Traffic Conference is an organization the same as or different from the Eastern Railroad Presidents' Conference?

Q. I thought I understood you to say they had nothing to do with each other, and my impression was they are composed of precisely the same Presidents.

A. The two organizations are entirely separate and distinct and exist for different purposes.

Yes, the same man is President of the road, but when he is sitting in an Eastern Railroad Presidents' Conference, he does not talk about rates and has no jurisdiction or authority to talk about rates, and he never does.

I have sat in many of those meetings, and if a President wants to talk about rates, he goes to the Presidents' Traffic Conference, which is provided for in this agreement.

Q. But these are the same people doing the talking in both instances,

11,311 is that right?

A. Oh, yes, they are the same people, but they may belong to a golf club, but that doesn't make the golf club the same as the Presidents' Traffic Conference.

Q. Representing precisely the same railroad interests?

A. Not the same interests, no, sir.

Q. Well, the same railroads, let me say that.

MR. GATES: Let the witness answer.

THE COURT: Now, wait a minute:

Mr. Burgess, let me suggest this, and Mr. Wright, again, wait until the question is propounded and then Mr. Wright, you do the same thing. Wait until the witness has answered, and then we will have a clearer record.

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: The interests of the railroads that are dealt with by the Presidents sitting in an Eastern Presidents' Conference meeting are different entirely from the interests of the same railroad that are dealt with when that President sits in a Presidents' Traffic Conference.

BY MR. WRIGHT:

Q. I understand that, Mr. Burgess. I was simply suggesting,

11,312 which I understand to be the fact, that the President in each case is representing the same railrdad.

A. He is representing a different interest of the same railroad.

Q. Yes.

A. Oh, yes, he is the same President.

Q. And is representing the same railroad in both cases?

A. But different interests of the same railroad.

* * *

DIRECT EXAMINATION OF GENERAL LASHER BY MR. BALL

11,323 Q. Will you state for the record your name, your present address, and your present occupation?

A. Edmond C. R. Lasher, 1420 Lake Shore Drive, Chicago, Illinois; President, North American Car Corporation, Chicago, Illinois.

Q. You hold what rank in the Army?

A. Major General, U. S. Army, Retired.

Q. Will you state your educational background?

A. I was educated in the public school system of New York State, attended Cornell University for about a year, and then went to the United States Military Academy at West Point, from which institution I graduated as a Second
11,324 Lieutenant, United States Army, in 1929.

I received certain further education during my years in the Army.

Q. We will cover that as we go along. What was your first interest in transportation in general?

A. My first interest in transportation occurred during my assignment with the Quartermaster Corps in the Army in which I had both transportation and warehousing experience, starting approximately 1935.

Q. Did you have any association at any time with the Transportation Corps? A. I did.

Q. Will you state your connection?

A. The Transportation Service, as it was originally called in the Army, was established shortly after the outbreak of World War II. Those of us in the Quartermaster Corps who had duties in the transportation field were assigned to that new Transportation Service.

This continued until some time after the war when the Congress established the Transportation Corps by statute, at which time I was officially transferred into the Transportation Corps.

Q. What were your assignments during World War II, General?
11,325 A. During World War II I was, with the exception of 1945, stationed in Washington, D. C., in the Office of the Chief of Transportation.

Q. Then, in 1945, what was your assignment?

A. In 1945, and during the year of 1945, I was stationed in New York City as Transportation Officer of the First Army and of the Second Transportation Zone.

Q. Going back to your assignment in Washington, what rank did you hold and what were your particular responsibilities?

A. At the outbreak of the war I was Lieutenant Colonel, and in June of 1942, June or July of 1942, promoted to Colonel, and remained Colonel throughout the war.

Q. And your assignment in Washington up to 1945 was primarily concerned with traffic matters; is that correct? A. Entirely.

Q. You were then, I recall, assigned to the Industrial College of the Armed Services; is that correct?

A. I believe that was '47-48.

Q. And what was your study primarily?

A. My studies included the industrial mobilization capabilities of our country against the industrial mobilization and capabilities of potential enemies.

Q. That included a study in part of the transportation, did it?

11,326 A. It included transportation, yes, sir.

Q. Did you have any study of the civil defense at that time?

A. I did.

Q. Tell us about that.

A. I believe it was in the early part of 1948 that the President directed the Secretary of Defense, Mr. Forrestal, at the time, to set up a study of civil defense requirements for the United States.

A group of individuals were assembled to make this study which resulted in a booklet which was published and which contained general outlines of instructions for all of the people of the country to follow in case of atomic emergencies.

Q. Did you have any assignment with the Joint Chiefs of Staff about this time?

A. The following year, the Joint Chiefs of Staff established a Joint Transportation Committee, and I was the first Executive Director of that committee.

Q. Will you give us the year or years of that assignment, General?

A. The latter -- well, '49, 50 -- '48, '49, '50.

Q. And what was your next assignment?

A. My next assignment was in the Far East as Transportation Officer
11,327 of the 8th Army of Korea, in Korea, when that war broke out.

I went to Korea in the summer of 1950 and stayed there as Transportation Officer, 8th Army, directing the transportation affairs for about 14 months.

Q. Your next assignment, beginning in 1951, was what?

A. Commandant of our Transportation School at Fort Eustis, Virginia. That lasted three years.

Q. Until 1954, then.

A. At which time I was returned to Washington as Assistant Chief of Transportation for Traffic. That was in 1954. That lasted two years, at which time I was assigned as the Executive Director of the Military Traffic Management Agency, which was an agency set up to coordinate the entire traffic responsibilities of the Army, Navy, Air Force, and Marine Corps. We put them all together and set up an organization to handle it, and I was the first Executive Director of that agency.

Q. To be more particular about the dates that you were Assistant Chief of Transportation for Traffic, if I understand, and correct me if I am wrong, you held that assignment from August, 1954, until July 23, 1956?

A. I believe that's right.

Q. Did you have any experience with the movement of men and ma-
11,328 teriel by railroads and trucks during World War II?

A. A great deal.

Q. Will you describe any particular incidents that struck you as significant in connection with that experience?

A. Well, the responsibility of my office was for the movement of all

men and materiel for the Army at that time, and we had everything to do with that responsibility, exercising it through the various posts, camps and stations of the Army, and the Transportation Officers we had there.

Q. Did you have experience both of the movement by rail and the movement by truck of men and materiel? A. I did.

Q. Did you draw any conclusions from your experiences as to the movement of men by one mode as against another, with reference to the use of manpower by the two forms of transportation?

A. We had been moving troops by rail considerably and at times, when we were drafting so many men, in the early days of the war, there were times when we felt we needed alternate means, and we tried two or three experiments with motor carriers in the handling of troops, moving troops and their baggage, one of which I remember was the Pennsylvania National Guard. 11,329 This was an experiment which hadn't been tried yet, and I was very anxious to find out if we could depend on the motor carriers as we could on the railroads. The Pennsylvania National Guard was moved down into North Carolina one summer for their two weeks training period, and instead of moving by rail I had them moved by motor carrier. So we assembled buses and trucks; the buses for the men, of course, and the trucks for the baggage. It was about a three-day movement, and they were moved in convoy, being assisted all the time with the men and their baggage, their rifles and duffels and so forth, to be kept together, so that they didn't get separated, and we moved them in convoys. The convoys were in various serials. That is, we had several trucks and buses in one serial, then there would be an interval where we had several others. It was necessary, of course, for us to control this large number of buses and trucks. It worked fairly well but there were several things that we noted that we were surprised at:

For instance, the gearing of the buses and the gearing of the trucks were such that going up and down hills the buses, geared much higher than the trucks, would run away from the trucks. We couldn't keep them together, we couldn't 11,330 get the control. And, finally, when we went to bivouac at night, that was very difficult. Also, we had difficulty assembling enough equipment, enough

buses and trucks, and in order to move this Division of National Guard from Pennsylvania to North Carolina, we had to gather buses from as far west as the Mississippi River. In doing so, we found that we disrupted regular commercial business in the bus lines, or some of these bus lines. Some of them had extra buses, but some didn't, and we disrupted the business elsewhere. We found certainly at that point it wasn't quite feasible to utilize buses and trucks for mass movement of men. It is not as satisfactory as rail.

Q. Did you make any studies about the comparative use of manpower and fuel in such mass movements?

A. Well, yes, considerably, particularly in the movement of freight, a unit of transportation in freight averaged 30,000 to 40,000 pounds. We were getting well towards twice that out of a unit of rail transportation. One man and one truck carried 30,000 to 40,000 pounds, whereas we had several -- 50, 75, 100 units, of much more than that in a train. And if you have a crew of five men in a train, and one on a truck, you can see the manpower.

11,331 We always made quite a fuss about that, because on the one hand General Hershey was trying to get recruits for the Army, and I use the words recruits," rather loosely, but nevertheless he was trying to get men for the Army and we felt that we should use the most economical mode of transportation as far as manpower and fuel were concerned, because they were the two items of defense which we were lowest in. A lot of our fuel had to come from overseas, and when those sources were closed to us, we had to depend upon our own. As far as manpower was concerned, we, of course, as you know, didn't have enough. The ladies had to go to work, and be riveters, and so forth. So we felt very strongly about the number of men per ton of freight that had to be carried, and it was considerably greater by highway than it was by rail; some 10 or 15 times, as a matter of fact.

Q. Now, General, turning to your assignment as Assistant Chief of Transportation for Traffic, in August of 1954 to '56, will you describe the organization over which you had supervision at that time?

A. During what periods?

Q. August, '54, to '56.

A. I was Assistant Chief of Transportation for Traffic, and I had
11,332 the responsibility for all the traffic functions of the Army at that time.

Q. What were the divisions or organizations that reported to you at that time?

A. Well, we had a Freight Division which handled all the matters of freight, the rates and routings. We had a Passenger Division who handled the similar work for our passenger movements. We had what we called a General Traffic Division which sort of picked up the odds and ends which were neither specifically freight or passenger. We had an officer counsel, a lawyer. We had some personnel, and we had some fiscal responsibilities.

Q. Was Col. Harpold -- H A R P O L D (spelling) -- in that organization at the time you were there?

A. Col. Harpold was Chief of the Freight Division when I reported for duty, yes.

Q. What were the responsibilities of Col. Harpold, and to whom did he report directly?

A. Col. Harpold, as Chief of the Freight Division of my office, was directly responsible to me for all freight matters.

Q. That included exactly what, General -- all freight matters?

A. That included the routing, the actual designation of the carrier to
11,333 carry the freight, the rate adjustment, the checking of freight rates, and so forth. But, primarily, the rates and the routes by which we moved freight.

Q. Do you recall approximately when Col. Harpold left that assignment?

A. I believe he was there approximately one year after I got there -- probably '54 or '55.

Q. And who succeeded Col. Harpold in that responsibility?

A. A man by the name of Filmore, Col. Filmore.

Q. The initials were "R. H."

A. Robert, yes; Robert H. Filmore.

Q. And how long was Col. Filmore in charge of freight?

A. Col. Filmore, until about early '57, I believe, approximately.

Q. Now, can you identify Col. Andrew Paul Flanagan? A. Yes.

Q. Who was Col. Flanagan?

A. Col. Flanagan worked under Col. Harpold and later Col. Filmore, and had the responsibility for rate adjustments and rate negotiations in the Freight Division.

Q. To be clear, then, the chain of command was that Col. Flanagan reported directly to Col. Filmore and he in turn reported to you; is that correct?

A. That's correct.

11,334 Q. What is the fact as to whether or not it was the responsibility of Col. Flanagan to make studies of rates and of the basis for such rates?

A. That was one of his primary duties.

Q. Now, was there any committee of the different Services in operation at that time serving as a liaison in transportation matters?

A. There was, at the Department of Defense level. That is, in the Office of the Secretary of Defense, he had a man who looked after the transportation activities of the entire Department of Defense, laid down general broad policies of the Secretary, and he had a committee, an advisory committee, composed of the four Services, Army, Navy, Air Force, Marine Corps, and at periodic meetings they gathered to make sure that their policies were in line with each other and that the Navy wasn't competing with the Army, or the Army with the Air Force, and so forth. In that way we maintained our connections with each other and saw to it that our transportation policies were parallel.

Q. And from time to time this committee would delegate to one of the Services or another, conduct negotiations, or other matters, that might affect the other Services as well?

A. We always coordinated those matters, yes.

11,335 Q. Now, during the period of '54 through '56, did or did not the Armed Services, to your knowledge, have a policy regarding the allocation of traffic between the different modes of transportation, rail, and --

A. We did.

Q. What is the fact as to whether or not you and the other members of the Defense Department felt that you had an obligation to abide by the requirements of the National Transportation Policies appearing in the Transportation Act of 1940?

A. Well, the Policy, the National Policy for Transportation, is enunciated in the Act to Regulate Commerce, and since that was our business, we felt that the policies as stated in there was the guide that we had to use, and we were very careful to stay within it. We supplemented it by Army Regulations in specific areas, and felt over and above and in conjunction with it, our responsibility to the taxpayer was to move our men and our materiel at the lowest possible rates we could.

Q. Were you aware during this time, '54-'56, of an assignment having been given to Col. Flanagan to investigate the rates at which ammunition and explosives were being carried?

A. Yes. As a matter of fact, I believe that was decided to be done be-

11,336 fore I actually arrived in '54. I think it had already started.

Q. And your predecessor immediately in your assignment was whom, General?

A. I think it was Col. Yount.

Q. And who was General Yount?

A. General Yount was my immediate superior. He was the Chief of Transportation. As I said, I was the Assistant Chief for Traffic. He had many other duties and many other responsibilities besides traffic, but I had the traffic responsibilities.

Q. And he had been on that assignment for some time before you came on it in August of '54?

A. Yes, two or three years.

Q. Do you know when this assignment was given to Col. Flanagan, to study the rates at which munitions and explosives were being carried?

A. I do not know exactly.

Q. It was, however, before you came to Washington, in 1954?

A. That's my personal recollection.

Q. Did you have any personal understanding of Col. Flanagan's rate study?

11,337 A. Considerable.

Q. Would you tell us about your association with the study?

A. Having been in essentially the same job during the war, I knew how much ammunition it takes to fight war, and how much we had to move, and when I arrived in '54, and found out that this study was going on, I paid more than a little attention to it. I was very interested that it be successful and that we somehow avoid some of these tremendous costs that were building up in the movement as regards particularly ammunition.

Q. General, if I may interrupt, you said you hoped it would be successful. What was the objective of the study?

A. The objective of the study was to get the reduction of rates and to save the Government and the taxpayer a little money if we possibly could. We weren't sure that we could, but as we marshaled the facts -- as Flanagan and his staff worked on this -- we felt as we went along we had a better and better case, as the facts came out, and as the material was assembled.

Q. What was the extent of the study and how was it prepared, General, to your knowledge?

A. The extent was very broad. We covered the movement of explosives very exhaustively, probably more so than had ever been done before, and arranged
11,338 the material in such a fashion as we thought would be compelling to the people we were going to talk to. Data was gathered over a period of years as to the movement, as to the costs, as we understood them, from official reports of the Commission, the Interstate Commerce Commission, and the rates, the

money that we were paying. We felt that we were paying more than the costs indicated was necessary, and we assembled our data in that fashion, so as to have a compelling argument when we went to the carriers.

Q. Did this study of the level of rates and of the costs of transportation include the level and the costs involved in the motor carriers as well as rail transportation?

A. It did.

Q. Do you have any recollection of the relative proportion of explosives traffic of the Army that was then being carried by rail, when you returned to Washington in 1954, as against truck or water?

A. No, I don't recall the exact figures. They are a matter of record, however.

Q. But you have no present recollection? A. No.

Q. Did you at any time have any discussions with Col. Flanagan as to
11,339 the use to be made of this study which he was preparing and supervising?

A. Considerable. We knew the objective, what we ultimately were going to do, that is, what we would call the strategy of the thing, how we would attack it. Discussions centered around primarily what we would call the tactics, how we would approach each individual piece of this study so that we could present it in the most compelling fashion. We finally worked out the system that we would use.

Q. General, did your review of Col. Flanagan's study lead you to any conclusion as to the then-existing level of railway rates?

A. Well, it confirmed what we had suspected, and that is that they were, in our opinion, too high.

Q. And what was the basis, primary basis, of your belief that these rates were too high, sir?

A. Well, the amount of revenue being received by both rail and motor carriers per unit of transportation; or what they received versus what we thought we were paying to haul it. We thought it was just too much, the spread was too high.

Q. What was the effect, if any, that the relative volume carried by units of rail had upon your study?

A. I don't know as I understand the question, sir.

11,340 Q. Well, let me restate it: Did you give any consideration to the relative ability of rail and motor carriers to handle mass quantities of materiel, ammunition and explosives?

A. Yes, oh, yes. Still I don't know what --

Q. Did the quantity or the ability of the rails to carry large quantities of ammunition enter into your studies and conclusions?

A. Very much so. The ability of the railroads to carry heavy mass amounts of both men and materiel were very pertinent in the study of ammunition, because when we are in a shooting war we move a lot of tons of ammunition and a lot of tons of everything else. It's hardly conceivable, the size of the transportation problem of the military in time of a war.

Therefore, we were very alert to the fact that both in manpower and in the motive power, the railroads had an inherent, an in-built ability to carry tremendous masses of tons which was not true of the motor carriers. They were limited in many ways. And we had to, therefore, place our main reliance upon the railroads.

Q. What were the recommendations that Col. Flanagan made to you as the result of your study, if you recall?

A. Col. Flanagan's conclusions were, as I stated, that the rates were unusually high, in his opinion, too high, and that we should take them,

11,341 take the study and prepare it and approach the railroads with it, drawing their attention to the fact that a certain lower and different level of rates was feasible for them to give to the Government.

Q. Did he make a specific suggestion as to what you should ask for in the way of a new rate level for the railroads?

A. Yes, the study included that.

Q. Do you have a recollection of what it was that you proposed to ask the railroads to give you in the way of a new rate level?

A. Based upon the size of a railroad car, we knew that we could put a lot more ammunition in one railroad car than we were putting in. The study went very much into the theory of the establishment of these costs, the rates, and we felt that if we put more tons in one car, that even though they reduced the rate per ton, they would still get the same number of dollars out of moving that car of freight as they had before with a fewer number of tons at a higher cost per ton.

And Col. Flanagan, although he is sitting in the audience this morning, I must say did an excellent job. And this was proven beyond a shadow of a doubt. So we were very well fortified when we went to the carriers, I feel, to argue this 11,342 morning. And it goes -- I might digress here just a moment. It goes into the theory of rate-making. And while we didn't go at it with any new ideas, we accentuated certain of the factors which go into the railroad rates that hadn't been accentuated previously, and we soft-pedaled some of the factors which they had had considerable to do about in the past.

For instance, one of the large factors in ammunition, of course, is the risk. Naturally, that was uppermost in everybody's mind, and it was in ours. The rate before this had included a considerable rate for insurance against that risk, a liability which the carrier faced when he carried the ammunition. He had to pay heavily for the insurance, or heavily guarding against it.

Our experience was, as far as the railroads were concerned, that risk, although a present potential, had never occurred. Our history was that was one of the safer commodities which we shipped on the railroads, and that while there was a potential danger and hazard, that they had overweighted that one factor. So we soft-pedaled that. We said, "Sure, that it is there, but we take particular pains when we move our ammunition. We see to it that you give us the right kind of equipment, we see to it that that equipment is clean, and when 11,343 we put the --

MR. WRIGHT: Excuse me just a minute: If this is supposed to be a conversation with someone, I think we ought to know who this was being said to, and when and where.

THE COURT: Yes; did you have a conversation with somebody?

BY MR. BALL:

Q. Was this in your discussions with Col. Flanagan, General?

A. This was part of the theory that we used in arriving at the approach to the carriers.

MR. WRIGHT: I assume that Col. Flanagan will be a witness here.

THE COURT: I take it he is going to be a witness.

MR. BALL: Yes.

MR. WRIGHT: Whatever he said I suppose will be developed from him.

THE COURT: Well, I don't know, but I mean, if it isn't, then you probably can develop it.

BY MR. BALL:

Q. Let me ask you this, General: A formal study or presentation was then in the course of preparation? A. It was.

11,344 Q. And the figures and statistics to support the position of the Armed Services that you have just enunciated were included in that report?

A. That's correct.

Q. Now, after this report was prepared, what decision did you reach as to your course of action, how you should present this?

A. We decided we would present it before the properly constituted and authorized committees of the railroads.

Q. Do you recall how many of those there were? A. Three.

Q. And do you recall what they were at that time?

A. Well, the East, there was the Traffic Executives' Association, in the Eastern railroads. In the West was, I believe, the Executive Committee of the Western Traffic Association. And in the South, the Southern Freight Association.

Q. Now, General, why did you decide to approach the railroads first, rather than the trucking companies? A. Well, primarily because in the history of rates, there had been over the past several years across-the-board increases

in rates, usually initiated by the railroads, and as those rates were approved by the Interstate Commerce Commission, those increases, usually the truck
11,345 rates followed right up under it, indicating to us that the bellweather of rates was the railroad rate. We felt also that, therefore, if the railroads made some adjustment in the rates, that the truck lines, as they had done historically, would follow.

Q. Did you give any consideration to the relative ability of rail versus truck to make lower rates?

A. Well, we felt that the spread between the cost of hauling the ammunition and what we were paying for hauling the ammunition was greater in the rails than it was in the trucks, and therefore the carrier, the rail carrier, was more vulnerable, and therefore we had more success -- would have more success.

Q. Now, will you explain why it was, General, that you elected to go to the three rate organizations, rather than to the individual railroads or through some other channel, with your presentation? Well, first of all, these associations were set up for this purpose, and the regular commercial shippers used this channel, and we felt that that was the proper way. However, in considering going to each and every railroad individually, that would have taken us two or three years, have been very expensive, very costly, and very unhandy, so because of those reasons we went to these Associations.

11,346 MR. BALL: I would like to identify some exhibits, Your Honor. What are the next numbers?

THE CLERK: No. 2 defendant, AWR's Exhibits Nos. 215 to 219, inclusive, for identification.

(Thereupon, documents were marked Defendant No. 2 (AWR) Exhibits Nos. 215 to 219, inclusive, for identification.)

BY MR. BALL:

Q. General, I hand you what has been marked as AWR defendant's Exhibit 215 for identification, which purports to be a letter of February 14,

1955, over your signature, to Mr. E. B. Hill, Chairman, Traffic Executive Association, Eastern Railroads, to Mr. H. C. Barron, Chairman, Executive Committee, Western Traffic Association, and to Mr. J. G. Kerr, Chairman, Southern Freight Association, and I ask you if that is, in fact, a copy of a letter which you wrote to those three individuals?

A. I believe it is, yes, sir.

Q. And that was, I take it, the initiation of your negotiations on the basis of Col. Flanagan's study?

A. I believe that was the opening invitation.

Q. Now I hand you what the Clerk has marked as Defendant AWR's Exhibit 216 for identification, which is a letter of February 21, 1955, over the signature of H. C. Barron, on the stationery of the Executive Committee, Western Traffic Association, and addressed to you, and I ask you if this is a letter

11,347 that you did receive from the Western Traffic Association in response to your letter of February 14th? A. It is.

Q. And I hand you what has been marked as AWR Exhibit 217 for identification, which is a letter signed by J. H. McMahan, of the Southern Freight Association, dated February 18, 1955, addressed to you, and ask you if that is the response you received from the Southern Freight Association? A. It is.

Q. I hand you also letters dated the 28th of February, 1955, and the 1st of March, 1955, which have been marked as AWR Exhibits 218 and 219 for identification, which are letters of Col. Filmore to Mr. J. G. Kerr of the Southern Freight Association, and to Mr. E. B. Hill, Chairman of the Traffic Executives Association, and ask you if you knew about the writing of these letters?

A. In general, I do.

Q. And these letters, to the best of your knowledge, were sent?

A. Yes.

THE CLERK: No. 2 defendant, AWR's Exhibits Nos. 220 to 228,

11,348 inclusive, for identification.

11,348 (Thereupon, documents were marked Defendant No. 2 (AWR) Exhibits Nos. 220 to 228, inclusive, for identification.)

BY MR. BALL:

Q. I hand you what the Clerk has marked as AWR Defendant's Exhibit 220 for identification, which is a letter of April 14, 1955, by Mr. H. C. Barron of the Western Traffic Association, addressed to you, and ask you if you did receive this letter? A. I did.

Q. I hand you what the Clerk has marked as AWR Defendant's Exhibit 221 for identification, which is a letter of April 18, 1955, from J. G. Kerr to Col. Filmore, and I ask you if you recognize that as a letter of which you heard in connection with these negotiations?

A. I believe it is.

Q. I hand you what the Clerk has marked as Defendant AWR's Exhibit No. 222 for identification, which is a letter of May 11, 1955, addressed to you over the signature of H. C. Barron, and ask you if you did receive this? A. I did.

* * *

11,349 Q. Now, 223 and 224 were letters of the 16th of May and the 17th of May, addressed by you to Mr. E. B. Hill and to Mr. H. C. Barron, and those letters were sent, were they not?

A. I'm sure they were, yes, sir.

* * *

11,350 Q. I hand you what has been marked by the Clerk as AWR Exhibit 225 for identification, which is a letter of May 27, 1955, from Mr. H. C. Barron addressed to you, and ask you if you did receive that letter? A. I did.

Q. And I hand you what the clerk has marked AWR Exhibit 226 for identification which is a copy of a letter from Gordon Lindsay, Assistant to the Chairman of the Traffic Executives Association, Eastern Railroads, addressed to you, and ask you if you did receive that letter? A. I did.

THE COURT: What is the date of that letter, Mr. Ball?

MR. BALL: July 7.

THE COURT: Thank you.

MR. BALL: Am I going too fast, if the Court please?

THE COURT: No, that is all right.

BY MR. BALL:

Q. I hand you what the Clerk has marked Defendant's Exhibit 227 for identification, Defendant AWR's Exhibit 227 for identification, which is a letter dated July 18 from Mr. McMahan to you and ask you if you received that letter?

11,351 A. I did.

* * *

11,352 MR. BALL: I wrongly identified AWR exhibit 229 for identification. That is a letter of February 24, 1955 to General Lasher from E. V. Hill, Chairman, Traffic Executives Association, Eastern Railroads. I also hand the Court a copy of this one.

(AWR No. 229 previously identified was CANCELED and a letter dated February 24, 1955, to General Lasher from E. V. Hill, Chairman, Traffic Executives Association, Eastern Railroads, was identified as AWR Exhibit 229.)

THE COURT: All right.

MR. BALL: If the Court does not mind scratching off the number and putting 229 on it.

THE COURT: All right.

BY MR. BALL:

Q. Then I ask you if you received this letter, General, 229 for identification?

A. I believe I did.

MR. BALL: Will the Court indulge me for just a moment?

THE COURT: Yes. (Short pause)

MR. BALL: Will you identify these two?

11,353 DEPUTY CLERK: No. 2 Defendant AWR exhibit 230 for identification.

(No. 2 Defendant AWR No. 230, letter of March 16, 1955 from J. G. Kerr, Chairman, Southern Freight Association, addressed to General Lasher, marked for identification.)

BY MR. BALL:

Q. General, I hand you what the Clerk has marked as AWR exhibit Defendant No. 230 for identification which is a letter of March 16, 1955, from J. G. Kerr, Chairman, Southern Freight Association, addressed to you, and ask you if you received that letter? A. I did.

Q. I hand you then what has been marked as AWR Defendant Exhibit 228 for identification which is a letter - a message from J. G. Kerr to a number of people in the government including yourself and I ask you if you did receive this communication?

A. I believe so, yes, sir.

(AWR exhibit 228, letter from J. G. Kerr to General Lasher and others in government marked for identification dated 3-29-56.)

MR. WRIGHT: Has that got a date on it?

MR. BALL: Yes, that is dated March 29, 1956.

MR. AILES: 1956?

MR. BALL: Yes, 1956.

11,354

BY MR. BALL:

Q. General, as a result of the correspondence including some that has been identified, did you meet with each of these three?

A. We did.

Q. At that time did you meet with them jointly or separately?

A. Separately.

Q. On different dates? A. Yes.

Q. And who was present representing the Department of Defense?

A. Colonel Flanagan and myself.

* * *

11,357

(AWR Defendant 2 Exhibit No. 231, Statement on behalf of Dept of Defense is marked for identification.)

(AWR Defendant No. 2 Exhibit 232 letter 4-14-55 to General Lasher by E. V. Hill, Chairman, TEA is marked for identification.)

* * *

MR. BALL: I would at this time like to offer into evidence AWR exhibits 215 through 232.

THE COURT: Any objection?

MR. BALL: The ones we marked this morning.

MR. WRIGHT: No objection.

THE COURT: No objection. They may be received in evidence.

(No. 2 Defendant AWR Exhibits 215 to 232 are received in evidence.)

BY MR. BALL:

Q. General, I did already call to your attention defendant's exhibit 215 for identification. This was the letter that you wrote to the three Bureaus to set up the presentation of your study, is it not? A. It is.

11,358 MR. BALL: Would the Court mind if I hand the copy to the jury?

THE COURT: Go ahead.

BY MR. BALL:

Q. Would you read the second paragraph -- well, would you read this letter to the jury, General? A. Yes.

"Gentlemen: The Department of the Army has completed a comprehensive" --

THE COURT: Wait a minute. Read to whom it is addressed.

THE WITNESS: Dated 14 February, 1955. It is addressed to Mr. E. V. Hill, Chairman of Traffic Executives Association, Eastern Railroads, 1 Park Avenue, New York 16, New York.

"Mr. H. C. Barron, Chairman, Executive Committee, Western Traffic Association, Union Station, Chicago 6, Illinois."

MR. BALL: We do not need to trouble the jury with the addresses.

THE WITNESS: Mr. J. G. Kerr, Chairman, Southern Freight Association:

"Gentlemen: The Department of the Army has completed a comprehensive study on the level of rates applicable to ammunition and explosives.

11,359 "The results of this study indicate that a more reasonable level of rates for the traffic would be Column 55 on 55,000 pounds."

THE COURT: 50,000.

THE WITNESS: "Column 55 on 50,000 and Column 40 on 80,000 pounds.

"It is realized that in the past carriers have been reluctant to discuss rates in connection with commodities involved in the Reparations cases. Attention in this connection is invited to the fact that hearings on the Reparations cases before the ICC have been concluded. The Department of the Army, therefore, believes that the establishment of a reasonable level of rates on ammunition traffic should not be further delayed. Advice is requested as to whether your committees will negotiate for a reasonable level of rates on ammunition and explosives on a nationwide basis.

"Sincerely yours."

BY MR. BALL:

Q. General Lasher, at the time you wrote that letter you were aware of the pendency of the Reparations cases?

A. Yes, indeed. As a matter of fact, I testified in the War Reparations.

11,360 Q. You were a witness in the Reparations case? A. I was.

Q. You knew in general what issues were involved in that case, then?

A. I did.

Q. You had in mind, when you made a reference to the reluctance of the railroads to discuss rates while this was pending--

Mr. WRIGHT: If the Court please, I think the General ought to be asked--

THE COURT: You object to the form of this question?

MR. WRIGHT: Form of the question, yes.

THE COURT: All right.

MR. BALL: I was trying to save time.

THE COURT: All right.

BY MR. BALL:

Q. What did you have reference to in the paragraph of your letter where you referred to your knowledge of the reluctance of the railroads to discuss these rates during the pendency of the War Materiel Reparations Case?

A. We realized that the -- we knew the War Reparations Case had to do with the level of rates and that the railroads were under attack, that that level was too high.

11,361 Therefore anything that they might at this later date do in the area of ammunition rates might jeopardize the position that they assumed in the War Materiel Reparations case.

Q. Did you reach any determination as to whether or not that pendency of the War Materiel Reparations case should delay your presentation?

A. We felt that it should not.

Q. And what were your reasons for feeling that it should not?

A. It was an entirely different situation. The War Reparations Materiel -- the War Materiel Reparations Cases had to do with movements which occurred during the war in approximately 1941 to 1945. The situation was considerably different. We were at war and we were moving ammunition in an entirely different manner. The question of transiting ammunition -- by transiting, I mean the movement, primarily toward export -- and storing in between, so that we could have our ammunition closer to shipside, when and if we needed to ship it. By doing that we received different rates, a lower rate when we transited than

if we shipped it direct to the point and then shipped it again from that point to the ports. That transiting gave us a considerable amount of benefit.

Furthermore, and probably the primary factor involved, was the
11,362 fact that since the war there had been several across-the-board, general rate increases by the railroads, and as each one of those occurred, the cost of our shipping of ammunition went up accordingly, and it became by 1953 almost intolerable. We felt it was too high. So, therefore, we felt there was no connection between what occurred in 1953, 1954 and 1955, and what occurred in 1941-1945. It was an entirely different situation. We tried to impress that thought upon the carriers. However, they were very reluctant to do anything which might jeopardize their position, and reluctantly we went along and deferred our presentation to them until their legal staffs felt that they were clear.

Q. Now, following the writing of your letter of February 14, 1955, you received replies, did you not, from the various rate bureaus. A. We did.

Q. And you had, for example, a reply from Mr. McMahan of the Southern Freight Association, dated February 18, did you not? Now, that is defendant's AWR exhibit 217 for identification. A. I did.

Q. Would you read the second paragraph of that letter, if you please, to the jury?

A. This is from Mr. McMahan of the Southern Freight Association.
11,363 The second paragraph reads:

> "This matter has now been submitted to the Southern Lines for consideration under Southern Freight Association GR-728, and I shall be glad to advise you the action taken in connection therewith.
>
> "Yours truly."

Q. Now, did you receive a reply from the Executive Committee of the Western Traffic Association, under February 21? A. I did.

Q. That is Defendant's exhibit 216, is that correct? A. We did.

Q. Will you read the second paragraph of that reply from the Western Traffic Association over the signature of Mr. Barron?

A. Mr. Barron, referring to my letter of February 14, says:

"I am today forwarding copy of your letter to our member lines. As soon as I am in position to reply definitely, I will advise you."

Q. Now, I assume, also, that you received the reply from Mr. Hill of the Traffic Executives Association, Eastern Railroads, and I ask you if that reply was the letter of February 24, 1955, defendant exhibit 229?

A. I believe this is the reply from Mr. Hill.

11,364 Q. I would like to have you read to the jury the second and third paragraphs of that letter?

A. In this letter of February 4, Mr. Hill refers again to my letter of February 14. He says in part:

"We have not yet placed your proposal before the Eastern Railroads for consideration. Before doing so, I should like to have some further information in the way of justification which I am sure is available to you. I believe you will agree that proposals of the Government agencies for reduced rates should be accompanied by the same type of justification as would accompany a similar proposal if filed by large commercial shippers. Your proposal of February 14 merely advises that, as a result of the study which has been made by your department, the rate levels you propose would be more reasonable than the present rate levels. This, of course, is a matter of opinion, that can scarcely be called justification."

Q. Then I would like to have you read the last full paragraph of this letter that Mr. Hill sent you for the Traffic Executives Association.

MR. WRIGHT: I think we should have the full letter. The Jury can't follow it at all this way.

11,365 THE COURT: Do you have any objection to reading the whole letter?

MR. BALL: In deference to the time, I should like to proceed with this. The whole letter can be read by Mr. Wright at any time he feels like putting the context in.

THE COURT: Strictly speaking, I think you are entitled to do that. Counsel can cross-examine on the whole letter. The only thing is, I will have to allow counsel for the plaintiff ample opportunity as you know, to cross examine. I do not know whether that can be done between now and one o'clock or not.

MR. BALL: If Mr. Wright wants this full letter read, General Lasher will read it.

THE COURT: Suppose you read it.

THE WITNESS: Thank you.

Dated February 24, 1955.

"Dear General:

"This will serve to acknowledge receipt of your letter dated February 14, File TCFTD RN 551.2, which has just come to my attention as I have been away from the office recently. I note Chairman Kerr has asked you to advise which class rate level you have in mind, using as a basis for your proposed ratings. I assume you will furnish me with a copy of your reply.

11,366 "We have not yet placed your proposal before the Eastern Railroads for consideration and before doing so, I should like to have some further information in the way of justification which I am sure is available to you. I believe you will agree that proposals of the Government agencies for reduced rates should be accompanied by the same type of justification as would accompany a similar proposal if filed by large commercial shippers.

"Your proposal of February 14th merely advises that as a result of a study which has been made by your department, the rate levels you propose would be more reasonable than the present rate levels. This,

of course, is a matter of opinion but can scarcely be called justification.

"When commercial shippers submit proposals for reduced charges they seek to justify them not only from the standpoint of reasonableness per se but indicate as best they can that their proposed reduced rates will in the final analysis work out to the mutual benefit of the railroads as well as the shippers by increasing the volume of traffic or for any other reasons which may occur to them.

"Statistical data which we have gathered during the past several years has indicated that the railroads' share of ammunition and explosives has declined, and that within the recent past they were handling only approximately 50 per cent of the available
11,367 traffic. If your proposal contemplates the use of the Docket 28300 class rates as a basis it suggests double reductions not apparent at first glance on traffic moving inter-territorially between points in Eastern territory on the one hand and the West, southwest and South on the other, because the docket 28300 class rate level is considerably lower than the old system of class rates applying in those areas to which your present basis of Class 65 is attached.

"I believe it has been estimated that on that inter-territorial traffic the docket 28300 class rates range up to 18 per cent lower than the old system of class rates. Added to that a proposed reduction in rating from Class 65 to Class 40 and Class 55, you can readily appreciate that as to the inter-territorial traffic described above you are suggesting very important reductions in the carriers' revenues without offering any quid pro quo.

"I believe you will want to consider this important feature before progressing the matter before the railroads. I urge you to do so.

"Perhaps the recent action of the Eastern railroads approving the establishment of storage-in-transit privileges of domestic shipments

of ammunitions and explosives on traffic or at and destined to points in Eastern territory will help change the railroad
11,368 picture.

"I hope you will understand I am not trying to be critical of your proposition -- I am only trying to point out that it probably deserves something more in the way of justification.

"With kind personal regards, I am

"Yours very truly."

THE COURT: Who sent that letter?

THE WITNESS: By Mr. E. V. Hill.

THE COURT: E. V. Hill.

THE WITNESS: E. V. Hill, Eastern Lines.

BY MR. BALL:

Q. Now, did you cause Colonel Fillmore to write a reply to this letter of February 24, and is the reply Defendant's exhibit 219? A. Yes, sir.

Q. Now, did you in that statement or letter of Colonel Fillmore assure the Traffic Executives Association that if they were interested in negotiating, a full proposal would be presented?

A. That is what this letter says.

Q. Now, I call to your attention the fact that you also received a reply, a further reply from the Southern Freight Association, from Mr. Kerr. I ask you if you recognize defendant's exhibit 230 for identification as this reply?
11,369 A. Yes.

Q. I am going to ask you to read the second paragraph of that letter.

* * *

THE WITNESS: The second paragraph of this letter dated March 16 reads as follows:

He refers again to my letter of February 14.

"This matter was placed before our Executive Committee for consideration last week. The decision was to disapprove the proposal as presented, this for two principal reasons, viz:

(1) no justification such as that usually presented was contained therein and (2), our people understand that the Department of Defense is now formulating a definite proposal fully supported to present to the carriers."

Q. Now, I want to call to your attention the exhibit 220 for identification which is a letter of April 14, received from Mr. H. C. Barron of the Western Traffic Association, and I will ask you if you received that letter. If you did, would you read the second paragraph of that letter. A. I did.

11,370 The second paragraph reads as follows:

"This is to advise that in so far as the Eastern lines are concerned" --

THE COURT: Sorry.

THE WITNESS: "Western Lines" -- I beg your pardon -- "inso far as the Western Lines are concerned, we are agreeable to conferring with you and/or your staff with regard to such negotiations."

BY MR. BALL:

Q. Now, I call to your attention next defendant's exhibit 232 which is a letter of April 14 to you from Mr. Hill, and I would like to have you read to the jury the first and second, I mean the second and third paragraphs on the first page of this letter. A. This is dated April 14 and again refers to my letter of February 14.

The second and third paragraphs read as follows:

"Since I last wrote you in reference to this subject on February 24, 1955, I have looked into the situation and find that the Eastern Railroads are very much concerned about this traffic, particularly because they feel that the railroads are not participating to the extent they should. The Eastern Railroads do not have in their possession facts and figures relating to the relative participation via rail versus

11,371 other modes of transportation and are not, therefore, in position to properly explore and evaluate their position. For reasons which I believe I need not explain here the Eastern lines, and I believe others

as well, have not until recently felt it would be advisable for them to proceed to a determination of the question but that impediment has been removed at least temporarily and, speaking for the Eastern lines I feel I can safely say to you that they would be anxious to receive such facts and figures as may be in your possession and which you would feel free to disclose so that they may study the problem and reach a conclusion within the very near future."

Q. Then I call to your attention the last full paragraph on the second page of this letter. Would you read that to the jury? A. Yes, sir.

"If you were in position to furnish me with your further views in connection with this important subject as early as May 7th, I would be in position to include it in our call for the May meeting which will be released on Monday, May 9th. In this connection it will be most helpful to the Chief Traffic Officers of Eastern railroads if you could arrange to be present
11,372 or authoritatively represented at our May meeting, to discuss the question generally and answer any inquiries which may develop in the minds of members."

Q. Then in response to this invitation, you sent your letter of May 16 to Mr. Hill, did you not, which is Exhibit 223? A. We did.

Q. I would like to have you read the second and third paragraphs of that letter.

A. This refers to Mr. Hill's letter of April 14, the second and third paragraphs as follows:

"I sincerely regret that supporting exhibits for the negotiation of rates on ammunition traffic were not available for distribution to the members of your committee by 7 May 1955.

"Your invitation to discuss the rate problem on ammunition traffic with the members of the Traffic Executive Association-Eastern Railroads at 10:30 a.m. May 1955 at New York is appreciated. I will personally attend this metting and I am looking forward

to the opportunity to discuss this mutually disturbing problem with you and the members of your committee.

"Sincerely yours."

11,373 Q. Now, as a result did you attend the meeting of the Traffic Executives Association on May 19?

A. I am not sure of the date. I did attend the meeting, if it was May 19.

Q. Now, at that time when Colonel Flanagan and you appeared before the Traffic Executive Association, did you have a written presentation that was handed the persons who were there?

A. I believe we did, yes, as I recall.

Q. Now, I hand you what was previously marked as TEA exhibit 5001 for identification, and ask you if that is the presentation, the copy of the presentation which was made by you and Colonel Flanagan to the Traffic Executives Association, Eastern Railroads? A. It is.

MR. BALL: I now would like to have received in evidence what has been previously marked as TEA exhibit 5001 for identification.

THE COURT: Who was it prepared by, General?

THE WITNESS: Prepared by Colonel Flanagan.

THE COURT: Any objection?

MR. WRIGHT: I assume Colonel Flanagan will testify.

THE COURT: He will be available. It may be admitted.

11,374 (TEA exhibit 5001 was received in evidence.)

MR. BALL: I would like to pass out copies of this to the jury so they may have it in mind.

THE COURT: All right. (Copies of exhibit TEA 5001 were distributed among the jury.)

* * *

BY MR. BALL:

Q. Now, Colonel Flanagan, I think you have stated --

THE COURT: General Lasher.

MR. BALL: General Lasher, yes. I am sorry.

THE COURT: Let us not demote him.

MR. BALL: No, he was demoted once earlier here.

BY MR. BALL:

Q. General Lasher -- that copies of TEA exhibit 5001 were made available to all of those present at the Traffic Executives Association meeting on May 19?

A. There was, yes.

Q. I notice particularly the date is fixed by the stamp that appears on the first page of Table No. 1 of May 19.

11,375 Now, in addition to handing out copies of this written presentation, what else did you and Colonel Flanagan do in presenting your case to the Traffic Executives Association?

A. As I recall the procedure, we were introduced and I made an introductory few remarks, leading to the presentation of the very technical data that we had, and following that, Colonel Flanagan stood up and gave this presentation, substantially as is written out there, supplemented however, with a considerable number of charts and graphs and so forth, picturing these figures as best we could. I then summed up and made the formal request at that time to the Eastern Railroads for serious consideration of the proposal that we had made.

Q. What was said by any representative of the Traffic Executives Association, if you recall?

A. Well, they gave me a pretty hard time. They asked some very searching questions, but one of the ones which they asked in the Eastern, and which was asked in the other two territories as well, "All right, if we give the government this reduction in rates, will you guarantee to give us the traffic?"

Of course, our invariable answer was no, we promised nothing. we could not promise anything.

11,376 For, had we -- for competing mode of transportation -- reduced rates to a point below the railroad rates, the competing mode would have gotten the

business. We were in no position to guarantee anything. We had to let our request stand upon the merits of the presentation and the money that we felt would be returned in the carriage of the ammunition.

Q. General, at any time during any of the discussions with any of the railroad bureaus, did you at any time make any commitment or give any assurances as to the volume of traffic that would result to them if they adopted this rate proposal?

A. On the contrary. We definitely stated that we could make no commitments. We were very positive on that.

Q. Now, did you discuss, General, the results or the figures with respect to the effect on profits of the quantitites that were to be shipped or induced to be shipped under your proposed proposal?

A. Yes, that was discussed.

Q. Do you recall what you may have said or what may have been said about that in the course of this meeting?

A. Not specifically. Only in a general way. That we felt that if the rates that we asked for were accorded the government, that more business would
11,377 flow to the railroads. We felt that that was the case.

Q. But did you discuss the effect upon the railroads' revenues, I mean on each shipment, of the quantities that were involved in the suggested minima that you had contained in your proposal, and the rates?

A. I believe that was discussed, that a carload of ammunition moved between two points would recover to the railroads, would accrue to the railroads as much revenue, if not more, actually per car, because we were putting more tons in each car: That, therefore, just because the rate per ton was reduced, the car was still making just as much money for the railroads -- perhaps not just as much but very nearly as much as it was before.

Q. Did you make any statement as to how your proposal would affect the average loading that would be made on cars?

A. Well, we had -- well, yes, our presentation to the railroads was predicated in part upon the fact that if we were given lower rates we would be

induced, we would have the incentive to load heavier and heavier, right up to the very load limit of the car: That, therefore, it would take a fewer number of cars to carry the same amount of ammunition and in time of emergency we need all the cars we can get.

Q. Now, I call to your attention in the first page a reference to a pro-
11,378 posed column 40, with the carload minimum weight of 80,000 pounds. Was there any discussion of the selection on your part of the minimum of 80,000 pounds which took place?

A. Well, I am sure there was. But I do not recall the details.

Q. Was that what you referred to when you said there would be an inducement to increase loading?

A. Yes, indeed.

Q. How would that inducement work?

A. Well, previously the minimums were much lower than that. But they carried higher cost per ton. Now, if they put more tons in the car and got a lower rate for it, we were very sure to load just as heavily as we could in order to get that lower cost per ton. If the railroads gave us a lower rate for more tons, we would put more tons in a car, that is all there was to it.

Q. In other words, you explained that the 80,000 pound minimum was put in there to give the government an inducement to increase their loadings, if the rate was given?

A. That is right.

Q. Now, did you have any discussion with the railroads at that time as to whether or not the proposed rate would be compensatory to them?

11,379 A. If we did, I do not recall.

Q. Did your studies deal with the subject or the exhibits here in 5001?

A. As I recall, it did, yes.

Q. What was your opinion as to whether the proposed rates would be compensatory or not, based on the study?

A. From our point of view, we felt that the rates were entirely compensatory. However, as the shipper we view the interpretation of compensatory

somewhat different than the carrier does. So, while that was compensatory from our point of view, it might not necessarily have been compensatory from the railroad's point of view.

Q. What you are saying is not, though, General, by the word "compensatory," that you felt that the railroads would recover even at these reduced rates more than their cost of hauling the goods, is that correct? A. Yes, sir.

Q. And did you make any studies that led you to the conclusion that would be the result?

A. I believe figures on those studies are included in some of these exhibits.

Q. In other words, the exhibits attached here, contained studies that indicated that the rates would be compensatory, did they not?

A. Yes, yes. It showed the earnings per ton-mile and compares the 11,380 earnings with each ton mile, with the earnings under the old rates, so that we would have before them facts and figures to support our presumption of proper compensation -- cost plus a reasonable profit.

Q. Then I take it that these figures were added or were included in the study and presentation to persuade the railroads that the lower rates were compensatory.

A. We had to put everything in there we possibly could to get them around to our way of thinking.

Q. And General, was the fact as to whether you received at that meeting of the Traffic Executives Association any promise to put in the lower rates?

A. We received no promise at that meeting to put in the lower rates.

Q. What did the persons present at the meeting tell you concerning the study that you had made?

A. Well, merely that they would take it under advisement, and let us know at a later date. That is about all we got out of them at that point.

Q. Was the fact as to whether or not during this discussion any mention was made of the pendency of the War Materiels Reparations Case?

A. As I recall that was always being considered. However, as that

drew to a close it became less and less of a problem to us and to the railroads.

11,381 Q. Did you have any discussion with any representative of the railroad in connection with this presentation as to whether or not the War Materiel Reparations case should stand in the way of their giving you this rate reduction?

A. Yes, there were certain representatives of certain railroads who felt that it was very much of a bar, and of course, we felt considerably otherwise, and then at every opportunity, tried to reduce the fear on the part of those railroads that these were two different and distinct propositions. But that was constantly occurring, and we had to knock it down every time it came up.

Q. You had to argue with the railroads about that? A. Yes.

Q. Now, when you and Colonel Flanagan went to the Traffic Executives Association with your presentation on May 19, what is fact as to whether or not you thought at that time that you were presenting material that was new to the railroads?

A. Well, many of the statistics that we used were based upon railroad figures. Of course, that was the source, how much they carried, how many miles they carried it.

Those figures are the figures -- the railroads have to file those figures with the Interstate Commerce Commission.

11,382 So much of Colonel Flanagan's research had to do with the official files of the Interstate Commerce Commission. Now, those figures and files were equally available to everyone, the railroads particularly.

We felt they knew these figures individually. But we did not think they had taken the time to take a piece of paper and a pencil and write them down and look at them, one with the other.

We, at least, took them and put them in proper order, in order to give our position a very compelling argument. I believe that was the main difference, that they had not been written down and studied the way Colonel Flanagan and his staff did it, to come to the conclusions.

Q. In particular, what conclusion did you feel that these pointed out that the railroads had not thought through before?

A. Would you ask that question again?

Q. What I mean is, is that or is it not a fact that you have reference to the impact of the quantity shipments on cost, that you thought the railroads had not considered?

A. Well, that was one of the rate-making factors that we made much point of. The ability of the railroads to haul heavy, heavy tonnages. We felt with the low minimums that they were at the time asking in their rates, the low 11,383 minimum weight per car was not taking advantage of their inherent ability as to heavy, mass transportation.

We suggested that these minimums be substantially increased, with a corresponding reduction in rate, per unit of weight, thereby getting almost as much per car as they did before, but hauling a lot more of our traffic. We, in turn, paying less per ton.

Q. What is the fact as to whether you believe the railroads had been previously fully aware of the impact of this suggestion?

A. We did not think they had given it full consideration or were fully aware of the impact; no we did not.

Q. Why did you think they actually had not fully appreciated it?

A. Well, because they, at least at the start, did not seem to take this line of reasoning of ours as seriously as we thought it warranted.

Q. Your effort was to persuade them to realize the facts, isn't that right?

A. That is right. We had to do that even after this formal presentation was made in New York, every time we had a chance, we had to press our point in order to keep the pressure on them.

11,384 Q. Now, what is the fact as to whether or not the Defense Department had previously made any such presentation in an effort to obtain lower rates from the railroads' ammunition?

* * *

MR. WRIGHT: There ought to be some preliminary questions which will indicate that the General knew.

THE COURT: Do you want to reframe the question, Mr. Ball?

MR. BALL: All right. I will reframe the question.

BY MR. BALL:

Q. General, do you know of any previous presentation that had been made to the -- by the Defense Department to the railroads in an effort to secure lower rates on ammunition?

A. Well, there had been considerable number, but merely on a point-to-point basis, on individual cases. That was the main effort we had made up to the time that the Flanagan study started.

Q. In other words, to your knowledge there had never been an over-all presentation made to the railroads asking for a reduction of the general level of 11,385 ammunition?

A. No, no, there had not.

Q. In connection with the point-to-point quotations, had any previous study been presented to your knowledge by the Defense Department to the railroads indicating the study of compensation at proposed rate levels? A. No, no.

Q. Now, General, you did manage in these point-to-point quotations that had been previously solicited -- do you recall whether or not in the presentation of this request on May 19 any reference was made to the point-by-point quotations which had previously been made by various individual railroads?

A. Yes, used that as one of our arguments.

Q. Just how did you use that as an argument, General?

A. Well, just how we put it in the argument, I do not know. But I can rephrase it.

Q. Yes.

A. Since certain railroads had felt it to their advantage to adjust a rate between two given points, we felt they were smart enough to do so only if they were making money. They would not reduce the rate below their costs. The rates we were getting between A and B and L and M and Q and R, in our minds set somewhat of a precedent that the general level of rates were too high, that

11,386 these point-to-point rates which we had received on occasion, and forced by competition in most cases, would return them enough money, and would in our mind form a precedent for this reduction that we asked for.

Q. Were you aware of any point-to-point reductions which were substantially known as that which you have asked for here?

A. I do not recall, offhand.

Q. Did you and Colonel Flanagan discuss at this meeting with the Traffic Executives Association the possibility of going to the Interstate Commerce Commission and asking for a lower rate?

A. Well, before we embarked upon this, I guess probably before the February 14th letter of invitation was issued, we had determined definitely among ourselves that -- we were not at all sure we were going to win this -- but if we did not get it in this fashion, through these regular channels with the carriers, that we would go to the Commission with our case. We felt strongly enough about our case, felt it was a good case, and we were prepared to go to the Commission. We let them know that we were, too.

That is somewhat of a threat, somewhat of a club over their head, true enough. But we were pulling out all of the stops that we wanted to make.

11,387 Q. So you did mention that possibility? A. Oh, yes.

Q. To the rate bureaus? A. Oh, yes, sur.

Q. Now, General, did you on other occasions make presentations to the Western Traffic Association and the Southern Freight Association?

A. In a very similar fashion to the one I have described in more detail here for the East, but at different times.

Q. Now, I hand you defendant's exhibit 231 and ask you if that is the presentation that was made by you and Colonel Flanagan to the Western Traffic Association?

A. I believe it is, yes, sir.

Q. And General, were there variances in your presentations to the three different traffic associations?

A. There were some variances, yes.

Q. Those were intended to meet the different conditions that were in the different regions?

A. Oh, yes, tonnages in the various regions were different, the competition was different, rates varied to a certain extent. We had to change the specific points in each one to fit the situation.

Q. However, the over-all presentation in the rates requested with the same in all three instances?

11,388 A. They were.

Q. And how long did this meeting with the Traffic Executives Association, Eastern Railroads, on the first presentation last, according to your recollection?

A. Oh, gentlemen, I do not know. A couple of hours, I would say, at least. Between our presentation and the questions and answers and so forth.

Q. Now, what is the fact as to whether or not, after the presentation that you made to the three rate bureaus, negotiations continued between your organization and the rate bureaus over the proposed reduction?

A. After the formal presentations?

Q. Yes, oh, yes, as I say. We had to keep the pressure on, and we did it formally through the Chairman of these committees. But we also did it through the individual representatives of the various railroads as they would come into our office, we would discuss it, it was quite uppermost in everyone's mind.

We pressed for not only our position but we pressed for an early resolution of the problem. We wanted to get on with it. We wanted to get it done.

Q. Well, now, just so that we have identified them, you speak of these local representatives of the three bureaus: Mr. Gordon Lindsay for the Traffic Executives Association, Eastern Railroads, is that correct?

11,389 A. That is correct.

Q. And Mr. McMahan for the Southern Freight Bureau, right?

A. That is right.

Q. And Mr. Leonard Hill, H-i-l-l, for the Western Traffic Association?

A. That is correct.

Q. And that is Leonard Hill, who is not the same person as E. V.

Hill of the Traffic Executives Association? A. That is right.

MR. BALL: Identify this, please.

DEPUTY CLERK: No. 2 Defendant, AWR exhibit 233 for identification.

(Presentation of General Lasher and Colonel Flanagan before the Southern Freight Association was marked for identification Defendant AWR Exhibit 233.)

BY MR. BALL:

Q. I hand you what has been marked as AWR defendant exhibit 233 for identification and I ask you if that is the presentation that you and Colonel Flanagan made before the Southern Freight Association? A. It is.

MR. BALL: I would like to offer this one in evidence.

* * *

11,390 THE COURT: Any objection?

MR. WRIGHT: No objection.

THE COURT: It is received.

(AWR exhibit No. 233 was received in evidence.)

THE COURT: Proceed.

BY MR. BALL:

Q. Again the presentation to the Southern Freight Association varied in the emphasis it gave in the factors peculiar to the territory?

A. That is correct.

Q. The presentations were essentially the same in the arguments presented, is that correct?

A. That is right.

Q. Again you had a meeting with the Southern Freight Association in which you presented your charts and answered questions? A. Correct.

Q. Now, did you have any occasion, or did you personally participate in the discussions with these three local representatives at various times: Mr. Lindsay, Mr. Leonard Hill and Mr. McMahan?

A. At various times I had considerable conversation over a period of

11,391 time with them.

Q. On the point of trying to keep up the pressure to get this reduction? A. Yes, sir.

Q. And did you follow the negotiation, the course of the negotiations that Colonel Flanagan was conducting with the individual bureaus?

A. Yes, indeed. As a matter of fact, our superiors were following it pretty closely, too. So we had to be on our toes pretty much as to just where it stood at all times.

Q. You had also conversations in Washington with Mr. Lindsay and Mr. McMahan, as well as with Mr. Leonard Hill? A. Oh, yes.

Q. Now, General Lasher, what was the fact as to whether you presented any further arguments from time to time in support of your proposal?

A. Well, I do not remember any specifics. We certainly went over the same territory and the same arguments, over and over again, with them and continued, to use the vernacular, to keep the pressure on just as much as we could in order to press our point.

Q. What is the fact as to whether or not you received any request for additional information from the rate bureaus?

11,392 A. I do not know. I do not know as to that.

Q. If they had asked for additional information, would you have given it to them?

A. Oh, very gladly.

Q. Had the railroads declined to consider the suggestion which you and Colonel Flanagan presented to the Rate Bureaus, what then in your opinion would have been the effect upon the railroads' explosive traffic?

A. Well, as I said, we were prepared to go to the Interstate Commerce Commission, and had they denied our request and the rates stayed as they were, the railroad portion on the movement of ammunition would have been very seriously curtailed, if not almost zero.

Q. What is the fact as to whether or not you expressed this opinion at any time to the representatives of the rate bureaus?

A. I think we did very carefully point out that. We showed them the trend, we showed them how it was moving, and we felt there was nothing to stop it except some readjustment, some realignment, of rates.

Q. And what was that trend at that time that you mentioned?

A. Well, month by month we kept track of the tonnage hauled by motor vehicle and by rail, and that by motor vehicle was increasing each month
11,393 and that by rail was declining each month.

Q. What is the fact as to whether Colonel Flanagan had any authority over the routing of shipments?

A. Well, he was the chief rate negotiation branch, and as such, had no direct contact with the routing of freight. However, in negotiating a rate, or rates, it has a vast effect upon how traffic is routed. In other words, if one route offers a different rate, that route -- a lower rate -- that route which offers the lower rate will be used, naturally. So that while he did not actually put the routing down on the bill of lading, the activities of his office had a very profound effect upon the movement and the routing of freight.

Q. What is the fact as to whether or not Colonel Flanagan worked in close cooperation with those specifically in charge of routing?

A. Oh, yes. When we would get a request for a large, large tonnage of a particular commodity, and we oftentimes did ship in very large quantities, the movement would be referred to Colonel Flanagan by the routing people to see if he could not negotiate a particular rate for that movement. So that if it was large enough to warrant special attention -- of course if he was successful to that extent he got into the routing. To that extent he was in routing if he
11,394 was successful in reducing rates. You understand that Section 22 of the Interstate Commerce Act allows us to get any rate reduction a carrier might see fit to give to the government. That was the basis upon which we approached these people.

Q. During this period, did you have any occasion to discuss the proposal of a rate reduction with representatives of individual railroads?

A. Oh, yes, from time to time that was done. Individual railroads

came in and asked questions about the proposals, asked questions about our exhibits, and so forth, which we of course, explained as we went along.

Q. Did you attempt to use any persuasive power on these individual railroads, General?

A. Indeed, yes.

Q. Now, what was the eventual result of your presentation and negotiation?

A. Well, the eventual result was somewhat of a variety of responses. The Eastern Lines, first came in with an offer which we felt was quite responsive. As a matter of fact, they had taken this incentive idea that we had presented and worked around it very well. We felt that their response was good. Later on, somewhat more reluctantly we thought, but later on the 11,395 Western lines came in. Part of them gave part-way, and some of them did not. But, in general, in the territory in which we were moving ammunition, we got about what we wanted.

The Southern Railroads held out. We kept the pressure on them, but they would not give in. They felt that they needed this higher rate. We told them that they would lose business, and they were losing it and continued to lose it --

Q. Do you have any specific case in mind where the Southern roads did lose business as a result of not making this rate reduction immediately?

A. Well, there is one particular case I remember. We had in North Carolina, the Government had built a special ammunition dock. We were handling a great deal of our ammunition through that but one of the Southern Railroads served that area as well as the highway. It was a retrograde, a movement of ammunition coming back from Europe -- I believe it was returned ammunition -- which was coming in for reprocessing.

You have to do that every once in a while. Normally it would flow through our own owned facilities in North Carolina. However, because of the higher rate in the Southeast, because they had not come down, we found that we could move it through Earl, New Jersey, which was a navy installation, which

11,396 charged us just as any other installation would, but their charges were very, very high and we had not used Earl, New Jersey, because of these high shipping charges through this facility, this port, but the rates in the South and the North, the railroad rates in the North plus the railroad rates in the West, were enough lower to more than compensate for the higher cost of moving through Earl, New Jersey, and we moved the ship into Earl therefore, instead of into Sunny Point, North Carolina. As a result, the Eastern Railroads and some of the Western Railroads participated in this heavy movement of ammunition, and the Southern lines got none whatsoever.

We always thought that that particular shipload of ammunition was the clinching argument for the Southern lines.

Shortly after that, they decided that they would like to participate, too, and they brought their rates in line with the rest of them.

Q. Well, in other words, the fact is, I take it, General, that after the East made what you consider to be a responsive proposal, you continued to keep up the pressure on the West and South? A. That is correct.

Q. And you used every argument, economic or otherwise, that you could? A. Right, correct.

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Q. I think you mentioned that the services solicited individual point-to-point reductions prior to your general over-all presentation? A. Yes.

Q. And it was the practice of the Department to solicit those point-to-point reductions from the railroads?

A. Under certain circumstances, yes, if the tonnage was large enough, if we felt the rates were out of line for the amount of tonnage we would ask for a specific quotation.

Q. What is the fact as to whether or not there were many point-to-point quotations being presented by the motor carriers for the carriage of ammunition and explosives?

Q. And in fairly large numbers.

A. Hundreds.

Q. General Lasher, in your discussions with the various rate bureaus

about your proposal for a rate cut, did the subject of domestic transit privileges arise?

A. As I recall, it did, in many of the discussions. The railroads felt that because of this storage-in-transit privilege I mentioned before, wherein we could move from A to C with the privilege of stopping at B for storage for a month or six weeks, they felt that was granting us a considerable less cost --
11,399 not reduction in rate but a less cost.

* * *

Q. General Lasher, after the East made the reduction in rates, which varied a little bit from your proposal, what was the reduction then that you continued to seek from the West and the South? Was it the same as you had originally requested, or was it what the East had made?

A. Well, the East, although the East did not give us everything we asked for, we felt it was quite responsive to our request. So we decided as we pressed the West and the South, to give them the alternative of meeting the Eastern proposal, or going along with our original proposal. We gave them that alternative. We asked them to give us one or the other. That is the way we put it.

MR. WRIGHT: I think we ought to have details. To say "We did this," that is rather general. I would like to know who when and where.

11,400 MR. SHEA: The Court please --

THE COURT: Just a minute, please, Mr. Shea. If you would, go into detail. Give us more detail.

BY MR. BALL:

Q. General, when you said that you gave or "we gave them", who did you mean by "we" in that situation?

A. When I said "we" I meant Colonel Flanagan and I, on behalf of the Department of Defense, told the Western Lines and later the Southern lines, that in view of the proposal of the Eastern Line that we would be willing to accept either the Eastern Lines' proposal or our original proposal, as presented to them, as a result of these negotiations.

Q. Now, you said a minute ago that while the east did not give you everything you wanted, what was the fact as to whether or not the east proposal was as low, especially as it would relate to loadings under 90,000 pounds, as the amount you requested?

A. Well, the Eastern lines' proposal, under 90,000 pounds -- the Eastern Lines' proposal we considered generally to be responsive. They gave us a little more -- they gave us a little less, rather, than we asked, on small loadings, but they gave us -- I beg your pardon, I think I am mixed up.

11,401 I would like to review the record to make sure that I answer this question properly.

Q. Well, what was the -- you mean, you want to look at the proposal, yourself, before you answer?

A. Yes, I would like to, if you want to press that question.

THE COURT: Do you have it there?

MR. BALL: I do not have the East proposal right here.

THE WITNESS: As I recall it -- let me try to answer it. As I recall it, they did not give us as much as we requested on the higher loadings. They gave us as much as we requested on the loadings when the tonnages were small. However, that meant not much to us, because our loadings were all high and that was what we predicated our argument on.

But we felt it was close enough in the higher weighted carloadings, close enough to our request, for us to consider it responsive, and we, therefore, did, and gave the alternative to the Western and Southern lines later on to meet that or our original proposal.

Q. General, comparing rail rates with motor rates in handling of explosives, in your presentation to the Rate Bureaus, did you or did you not take into account a factor called "disabilities"?

11,402 A. Yes, indeed we did.

Q. Will you explain what is meant by "disabilities"?

A. Well, "disability" is a word which kind of crept into our conversations. It had to do with the manner in which we handled our explosives traffic, our ammunition.

We stored our ammunition generally in remote places, large ammunition dumps, which were composed of what we called "igloos." These "igloos" were just that. They were earthen igloos. Each igloo carrying only so many pounds of explosives, and then so many feet between each igloo, and they were stretched out for acres and acres in order for us to be able to store all the ammunition we had. Ordinarily when we built those we would put railroad rails up to these igloos, and roads, so we could load right direct from a car to an igloo, or vice versa, from the igloo to the car or the truck. However, we had so many of them, we needed so many during the war, and we were building them at a rapid rate all over the country, and ask you recall steel was very short. So, in many of the ones that were built during that period of time, we did not put rail sidings into the igloo, it just took too much steel and we had only roads going into these igloos.

11,403 So, in the case of railroads, we would have to unload the car at some central point and move it in the truck to the igloos, usually at our government expense, which added to the cost of moving the ammunition from point to point.

In most cases, however, you can readily see that the truckers could bring their truckload of ammunition right to the doorway of the igloo. The government did not then have that added expense of rehandling it and moving it to the igloos. In that case it was known as a disability of the railroad.

"Disability" because they could not deliver to the door of the igloo. So, those "disabilities," which, in some cases were disabilities of the railroads and in some cases, in other instances, disabilities of the truckers were added into over-all costs.

Now, it must be borne in mind that we did not just consider the rate from A to B. We considered the overall cost of the movement entirely, and we added in these extra costs. So, rates from point to point, if the railroads -- when they had a disability, if they wanted to be competitive, they would have to lower their rate enough so that the difference would compensate and pay us enough to move it from the railhead by our trucks, to the igloos.

11,404 So, we came to a study of the rate situation in the movement of ammunition; we were very careful to point out these disabilities, and that they were a

further argument on our part for the railroads to become competitive.

Q. Those disabilities were converted in each instance to so many dollars and cents?

A. Oh, yes.

Q. And those figures as to disabilities, the figures as to the amount of dollars and cents in each instance were computed by you, and were available?

A. Right.

Q. Are you acquainted with a Mr. Burns, who, during the period of 1954 through 1956 was with the Munitions Carriers Conference?

A. I am and was.

Q. And did Mr. Burns or other representatives of the Munitions Carriers Conference ever solicit or urge that a greater share of explosives traffic be carried by truck?

A. Yes, of course they all did. A fair share, whether it was a railroad or trucker, a fair share of the business was 101 per cent. They were always in our office. The business was there. They wanted it, and they were all in business
11,405 to make money. We understood that. It was our side of the case that we wanted to move this as cheaply as possible. But, solicitation was constant.

Q. Did Mr. Burns and the Munitions Carriers Conference actively seek information as to the changes in rate levels as to specific quotations?

A. Oh, yes, yes.

Q. What was your practice, as to whether or not you would for either truckers or railroads, or their representatives, concerning the amount of ammunition traffic being handled, as between the two forms of transportation?

A. Well, you understand, this was a pretty big piece of business that we were handling, and ammunition was not the only thing that we were handling. The competition was very keen between railroads, themselves, between truckers, and between the two modes. They wanted to be sure they all got a piece of the business. Whenever one had a legitimate reason for wanting to know where he stood as opposed to his competition, whether it was the same mode or a different mode, we made that available and talked it over with him, gave him every chance to present his case, and the figures were made available.

However, we did not make those figures available on tonnage, as a
11,406 general rule. The administrative work was just too heavy to do that.

Q. Did you ever discuss with Mr. Burns or anyone from the Munitions Carriers Conference, or with other representatives of the Motor Carriers, the specific amounts of dollars and cents of rail and truck disabilities at various points? A. Yes.

Q. Was there any policy gains during this information? . .

A. No, there was not.

Q. Were you acquainted with a Mr. Carlos Romulo as a representative of Riss & Company? A. I was.

Q. Did you ever have any occasion to meet with him? A. Yes.

Q. Did he come to your office and solicit business?

A. From time to time.

Q. He was active in soliciting traffic for Riss & Company in the explosives field?

A. Yes, he was, very active.

Q. Were you acquainted with Mr. Robert Riss?

A. Not well. I have met him.

Q. Did you know Mr. Lawrence Quinn, the vice president of Riss & Company?

11,407 A. Not well, but I met him from time to time.

Q. Had he ever presented any Riss problems to you?

A. I believe so, from time to time, most of them he did.

Q. Were you acquainted with a vice president by the name of Calvin Rhodebeck of Riss & Company? A. I was.

Q. Did he ever appear before you or your department soliciting business for Riss & Company?

A. Yes, right.

Q. Now, did your organization in 1954 through 1956 concern itself with compliance by truckers with the weight and load limits set out in the laws and regulations of the various states through which they were going to move or to haul explosives traffic?

A. We did concern ourselves with it, yes.

Q. In the loading of trailers with ammunition and explosives, was it

the responsibility of the defense department to determine whether the loads complied with the weight limits of the various states?

A. Oh, no, now that was the responsibility of the Interstate Commerce. We did not have any jurisdiction over that.

Q. It was the responsibility of whom?

11,408 A. Of the Interstate Commerce Commission. Primarily we looked to the certificate of the carrier for his authority to move ammunition between the points we wanted it moved. If he had that authority, as far as we were concerned, that was enough for us. We used him.

Q. What was the fact as to whether or not you looked to the trucker to tell you what maximum load he could transport between two given points, to determine what the maximum amount of the load should be?

A. Well, we left it up to him entirely.

Q. Were there any occasions to your knowledge when the military required truck operators to operate their motor vehicles with explosives in excess of state regulations? A. Oh, yes.

Q. How were those particular situations handled?

A. There were a number of them. When it was a military necessity, we invariably got the authority from the Governor of the State involved, and that State would invariably give us the authority to exceed, in one way or another, the limitations of that particular state and in many cases would give us motor vehicle escort through. We asked for this relatively seldom, but there were many cases on which it was necessary. We never asked for it unless it was, and we invariably got it. They always gave it to us, and even helped us.

11,409 Q. Do you acknowledge that you ever asked a shipper to carry overweight shipments without getting particular approval?

A. I do not think we did.

Q. What is the fact as to whether or not the organization which was under your supervision concerned itself with the factor of safety in the transportation of explosives?

A. Well, as I said a moment ago, those things were responsibilities of

the ICC. But it got to the point where we were always blamed, it was always Army Ammunition that blew up, where there was an accident. The local papers would come out and say "Another Load of Army ammunition" here and there, and so forth. So we took it on ourselves to do a certain amount of policing that we could do, with the people we had. We did not put on any extra, but we were careful to examine the equipment as much as we could. We had, I remember, in Salt Lake City, for instance, we had a whole big yard set apart where motor carriers would have to come, where we could inspect the tires, the brakes, and the general appearance and qualifications of the equipment offered.

Now, understand, when rail equipment was offered, we invariably, for ammunition, asked for what is known as Class A box cars. We made sure, too, 11,410 that the box car was fit for ammunition loaded -- no nails protruding from the side and so forth. We were careful about that, very careful. We did it to the best of our ability.

Q. In the making of reports of accidents involving explosives, did you require that?

A. By wire, immediately.

Q. You made compilations and studies of these reports? A. We did.

MR. BALL: Your witness.

(Objections by Defendants 7, 81 and 88 are as follows:)

Defendants (7) Atlantic Coast Line Railroad Company, (81) Southern Railway Company and (88) Seaboard Air Line Railroad Company each object to the ruling of the Court on June 6, 1960, admitting into evidence against all defendants documents which theretofore had been admitted only against particular defendants:

(1) For all the reasons stated by any and all defendants at the time said documents were offered and admitted against particular defendants.

(2) Because plaintiff has failed to introduce substantial evidence of the existence of the alleged conspiracy or of the participation by defendants (7), 11,411 (81) or (88) in such a conspiracy or in any conspiracy actionable under the antitrust laws.

(3) Because the Court did not instruct the jury that the said documents could be considered against defendants 7, 81 or 88 only if the jury first finds from evidence independently admissible against a particular defendant that that defendant participated in the alleged conspiracy.

(4) Because the Court did not instruct the jury that the said documents could be considered against defendants 7, 81 or 88, even if found from independent evidence to have participated in the alleged conspiracy, only if the jury also found that the said documents constituted acts or declarations in furtherance of the alleged conspiracy as understood by the particular defendant.

Each of the aforesaid defendants also objects to the admission into evidence against it of plaintiffs exhibits 41-47, 49-53, 59, 63, 64, 66-70, 103, 104, 106, 108, 111, 112, 114, 115, 117, 122, 124, 125, 127, 129-132-A, 134-137, 140-165, 170-183, 185, 187, 189, 189A, 191-195, 199, 206-212, 223-224A, 244, 245, 257-280 for the reasons that there is no evidence that the said exhibits or any of them, were written for the purpose of furthering the accomplishment of
11,412 of the object of the alleged conspiracy, and the said exhibits either reveal on their face or have been shown by plaintiff's own evidence not to have had such a purpose or otherwise to constitute an act or declaration in furtherance of the alleged conspiracy.

Respectfully submitted

Francis M. Shea
Attorney for Defendants 7, 81 and 88.

* * *

CROSS EXAMINATION

BY MR. WRIGHT:

Q. General, what was the position you say you hold now?

A. Now? President of North American Car Corporation, Chicago, Illinois.

Q. What business are they in?

A. The leasing of specialized railroad and new trailer equipment.

11,413 Q. It is railroad cars and you also lease, you say, trailers, these trailers for trucks?

A. Yes, over-the-road semi-trailers.

Q. Trailers that are used in piggyback movements?

A. Some of them.

Q. Who do you lease these railroad cars to?

A. Mostly to shippers.

Q. And what use is made of those? Explain how the business is operated. What does the shipper do with the car when you let it to him?

A. He takes it over and loads it and uses it as he would a car furnished by the railroads, only it is his car, under his jurisdiction.

Q. What determines whether or not the shipper uses a car of his own or one furnished by the railroad?

A. Generally speaking, that is determined by the ability of the railroad to furnish the type of equipment necessary. It is mostly specialized railroad equipment required because of the peculiarities of particular shippers, which it would be impossible for the railroads to furnish, private carlines, in which North American is one, place themselves in a position to lease these specialized cars to shippers.

Q. Do you also lease to railroads? A. We do.

11,414 Q. What railroads do you lease them to?

A. Well, the two larger contracts we have with railroads is with the Baltimore & Ohio, and Chicago & Northwestern.

Q. Those are your principal customers?

A. That's right.

Q. You have others?

A. I beg pardon?

Q. You have others?

A. Well, much smaller.

Q. And these cars, you say, are specialized equipment. What would that be; what kind of cars?

A. Well, for instance, the tank cars which are moving, to a great extent, moving chemicals now. The requirements for the various chemicals

are such that one chemical shipper needs a particular type of lining so it won't corrode the metal of the car, special valves, and in that countless valves may be made of monometal, stainless steel, and such. Those peculiarities of the shipper's commodity are such that he needs a variety of specialized cars and railroads can't furnish them, and we do.

Q. You lease flat cars, piggyback equipment? A. We do.

Q. And what determines whether or not a railroad uses equipment of its own, or leases from you?

11,415 A. It's entirely up to the railroad, and the peculiar economics of that particular railroad as to whether they figure in their individual instance it is more economical, more to their benefit, to lease than to own, they will lease. If they feel it is more beneficial to them to own all their equipment, they won't lease.

Q. Who owns this company you are the President of?

A. It's a publicly-owned company.

Q. Beg pardon?

A. It's a publicly-owned company.

Q. You don't know who the principal stockholders are? A. Yes, I do.

Q. Who are they?

A. Well, one of the larger stockholders is an old ladies' home in Evanston, Illinois. We support the stock that they have and our company supports about 250 elderly, indigent ladies in the State of Illinois.

Massachusetts Mutual Life Insurance Company is another large stockholder.

The Investors Diversified Service, a mutual stock fund in Minneapolis, is another large holder. Those are the major large stockholders.

Q. Do any of the railroads with whom you do business also own stock in the company? A. No.

11,416 Q. Are there any others? A. Any other what?

Q. Other railroads who are stockholders of your company?

A. Not to my knowledge. I think the answer is unequivocally no.

Q. And you say that these cars you lease, however, are, of course, exclusively used in railroad operations. That's correct, is it not?

A. Well, the railroad cars we lease are used in railroad operation, yes.

Q. I suppose it's true, is it not, that in this business you are in, it would be rather difficult to survive in it without the goodwill of the railroads. There is no doubt about that, is there?

A. No -- yes, there is some doubt. As a matter of fact, as I said originally, a majority of our cars are leased to shippers.

Q. Yes, but for use on railroads.

A. They don't use them if they don't want to. But that, of course, is where they do use them. But our business, our business is to a large extent with the shippers, not with railroads.

Q. And you yourself occupied this job as soon as you left the Army; 11,417 was this the first job you held after you left the service? A. It is.

Q. Now, you were telling us about these negotiations you had with the railroads, and I was just curious as to whether or not you thought it was necessary for you or Col. Flanagan to explain to the railroads how to compete with motor carriers?

A. No, we didn't think it was necessary to explain to the railroads how to compete with the motor carriers.

Q. In so far as meeting the competition of the motor carriers for the shipment of explosives and ammunition is concerned, the railroads, any group of them, or any one of them, was always free to submit a quotation to the Defense Department, was it not?

A. Any railroad, any motor carrier, was free at any time to submit on their own initiative, which we referred to as Section 22 quotations under the Act, rates which in their opinion might move traffic. They could do it at any time.

Q. And they had frequently in the past done that, hadn't they?

A. Oh, yes. Those are the point to point rates I referred to.

* * *

11,418 Q. And that had frequently occurred, had it not, prior to these negotiations of yours?

A. Yes, sir, those point to point rates I referred to before are the result of that very thing.

Q. And those, of course, are the rates which would be necessary to take into account whatever these disabilities were at particular points; isn't that correct?

A. To an extent that's correct, yes. Some of them were; some were not.

Q. Now, when you made this general proposal here, what was the level of rates that ammunition and explosives were then moving at?

A. I believe --

Q. The railroad level.

A. I think it was 65 per cent of First Class.

Q. And that was with what minimum?

A. I don't recall. I don't recall.

11,419 Q. Do you recall it was 50,000 pounds?

A. No, I think it was 40,000 pounds. But I'm not sure. I would have to refresh my memory now.

Q. Well, in any event, when you made your proposal here that is in evidence as TEA 5001, you didn't suggest, did you, that there be any lowering of the minimum quantity at which the rate would apply?

THE WITNESS: Read that question. (Question read:)

MR. SHEA: If the Court please, these questions seem somewhat ambiguous to me. Is Mr. Wright talking about point to point rates on which ammunition was actually moving, or is he talking about the Class Rates?

THE COURT: Wait; do you have an objection, or do you just want clarification?

MR. SHEA: I object on the ground that the question is ambiguous.

THE COURT: All right, will you state it?

BY MR. WRIGHT:

Q. Was the question clear to you, General?

A. I think I got what you meant. I believe you were referring --

Q. What I was referring to is your proposal here that is in evidence as TEA 5001 which you and Col. Flanagan made to the Rate Bureau.

11,420 A. That's what I understood your question to refer to, and my answer was no, we did not ask for lower minimums.

Q. What you proposed here was 55 per cent of the First Class rates for a carload minimum weight of 50,000 pounds, did you not?

A. I believe that's correct.

Q. That what you were suggesting, in so far as 40,000 pound shipments are concerned, if the rate was then 65 per cent, there would be no change; is that right?

A. No, we did not make any request as to a 40,000 pound minimum.

Q. You made no proposal for any reduction as to 40,000 pounds?

A. That's right.

Q. And as to 50,000 pounds, you proposed a reduction from 65 per cent to 55 per cent of First Class; is that right?

A. I believe that's correct.

Q. Now, the fact is, is it not, that the Eastern Railroads, the first ones who responded or who moved toward a reduction after you made this proposal, did not put into effect a 55 per cent rate on minimum shipments of 50,000 pounds, did they?

A. I would have to refresh my memory on exactly what they put in.

11,421 Q. Well, you don't have to. We have here the quotation that they-- Well, I can make it a little clearer here with the minutes of the meeting where they decided what to do, which is in evidence here as Exhibit 200 (handing to witness.)

MR. GATES: May it please the Court, I think the witness is entitled to the actual proposal which was submitted to the Government, which is Exhibit 201.

MR. WRIGHT: If you want to look at the quotation, that is here as 201. 200 is the meeting at which the Government proposal was considered, and the

quotation that you see as 201 was voted for. Just take your time and read both of them, if you want, before you answer.

MR. McGLOTHLIN: If Your Honor please, I think there is a misdescription. My recollection is that 200 was the Chief Traffic Officers' meeting on September 28th.

THE COURT: Is that your understanding, Mr. Wright?

MR. WRIGHT: That's exactly what it says, precisely what it says on its face.

MR. McGLOTHLIN: The Eastern Railroads had already adopted the rate for movements within Eastern Territory at a meeting of TEA two days
11,422 earlier, on September 26th. I'm not aware whether or not that document is in evidence or not, but I'm just anxious that a description be clear.

THE COURT: Is this document in evidence?

MR. WRIGHT: This document is in evidence, and if the witness will just read the first paragraph out loud, General Lasher, maybe that will satisfy Mr. McGlothlin.

THE COURT: All right.

MR. BALL: Which exhibit, Mr. Wright?

MR. WRIGHT: Exhibit 200.

THE WITNESS: You want me to read 200?

BY MR. WRIGHT:

Q. Yes, just read the first paragraph.

A. (Reading):

"Consideration was given to a proposal which the Department of the Army in behalf of the Department of Defense had presented separately to the rail carriers in Eastern, Southern and Western Territories, and in connection with which representatives of the Department of the Army had appeared before the Chief Traffic Officers of Eastern, Western and Southern lines at their respective meetings to establish a general level of rates on ammunition and explosives which would reflect Column 55 of the applicable First

11,423 Class rates, carloads, minimum weight, 50,000 pounds, and Column 40 of the applicable First Class rates, carload minimum 80,000 pounds."

Now, that's our proposal.

Q. Yes.

THE COURT: Excuse me a minute: What is the date of this?

THE WITNESS: This is dated October 13, sir.

THE COURT: Of when?

THE WITNESS: 1955.

THE COURT: Thank you.

BY MR. WRIGHT:

Q. If you will just read the next paragraph, please?

A. (Reading):

"In the following discussion it was recommended that the proposal of the Department of the Army be not approved and in lieu thereof the following bases were recommended:"

Q. Now, the bases that the rates that the railroads themselves decided to adopt and actually put into effect, were they not? Now, as to 40,000 pounds, they proposed to put into effect a rate of 45 per cent of First Class for 40,000 pounds. Isn't that right?

A. That's the proposal, yes. That's one.

11,424 Q. You have proposed no reduction from the existing 65 per cent for 40,000 pounds. Isn't that correct? A. I believe that's correct.

Q. And as to a 50,000 pound shipment --

MR. BALL: Well, Mr. Wright, let me --

THE COURT: Let him finish the question.

MR. BALL: I want to object to the phrasing of, the use of the words "the railroads," when this is a reference only to the Eastern Railroads Traffic --

THE COURT: Well, confine it to whatever railroads are involved. Repeat the question, then.

BY MR. WRIGHT:

Q. And as to 50,000 pound shipments, what you had proposed was a rate of 55 per cent of First Class. Is that not right?

A. Yes, that's correct.

Q. And what the railroads proposed and what they put into effect was, for 50,000 pound shipments, a rate of 45 per cent on the first 40,000 pounds, and 36 per cent on the next 10,000 pounds. Is that correct?

THE COURT: Just a minute, gentlemen: What Mr. Ball is about to object to, I think, is that you use the term about the railroads. Can you specify which railroads?

11,425 MR. WRIGHT: Well, all of the railroad defendants in this case, and all of those involved by the Association, as has already been shown in evidence here ultimately put into effect these particular rates. Now, it is true that at this particular time the proposal to put in the 45 per cent, 35 per cent rate, was confined to the quotations in the Eastern Territory, but it is an established fact in the case that ultimately, by April, 1956, all of these railroads put these same rates into effect.

MR. BALL: I want to ask that these remarks be stricken out.

THE COURT: Just a minute. When the Court is about to speak, I don't want any interruption: I think that this witness can take care of himself on cross examination. Now, if he doesn't understand the question, he can say so.

MR. BALL: Statements have been made in front of the jury by Mr. Wright which are contrary to the record. I move to strike his statements out.

THE COURT: I will strike his statement, and I will ask him to re-frame his question. Let's proceed.

11,426 BY MR. WRIGHT:

It's a fact, is it not, that first the Eastern Railroads, in October, 1955, issued a quotation which for 50,000 pound shipments was 45 per cent of First Class for the first 40,000 pounds and 36 per cent on the next 10,000 pounds in the shipment. Is that correct? A. I believe that's correct.

Q. And your proposal for 50,000 pound shipments had been a flat 55 per cent for the 50,000 pounds; is that correct? A. I believe so.

Q. Now, it is also a fact, is it not, that at a later time the Western

and the Southern Railroads also put into effect precisely the same quotation as the Eastern Railroads for those shipments of 40,000 and 50,000 pounds that I have just described?

MR. BALL: I object because Mr. Wright knows full well that he is trying to put words into the mouth of the witness which are contrary to the record facts, that in certain territories this rate was put in, but by the Western Railroads it was never put in with respect to a large part of the Territory and with respect to the Southern Railroads it was not put in on shipments involving Transcontinental.

THE COURT: If the witness knows he may answer, and if he doesn't
11,427 know, he may answer.

MR. BALL: It's the question of the fact known to be contrary to the record, is what I object to.

THE COURT: Do you accept that contention that it is contrary to the record? He says what is implied in your question is contrary to what is in the record.

MR. WRIGHT: I think the witness is perfectly capable of giving a yes or no answer.

THE COURT: Just a minute, Mr. Gates.

MR. WRIGHT: He knows, I presume, whether or not he later got quotations from the Western and the Southern Railroads of 45 per cent on the 40,000 pound minimum and 36 per cent on the excess.

THE COURT: All right, if he knows that, he can say so.

MR. WRIGHT: If he did, he can say he did, and if he didn't he can say no, he didn't.

THE COURT: All right.

MR. BALL: My objection, Your Honor, is that this is one of your "when did you stop beating your wife" kind of questions:

He says, "Wasn't the thing that you received" and then he describes it and he got it from all the roads. The question -- yes or no -- can't be answered directly that way, because he did receive from some of the railroads

11,428 a proposition but not from all of them.

THE COURT: Can't he answer it yes or no?

MR. BALL: I don't think so, with the assumption that is implicit in the question.

THE COURT: All right. Mr. Shea.

MR. SHEA: By a series of adroit questions it is perfectly possible --

THE COURT: Wait a minute, Mr. Shea: I permitted wide latitude on the direct examination, I have permitted hearsay evidence to come in from this witness, and there has been no objection. I think the witness is a very intelligent witness, I think he is well able to take care of the situation, or answer the questions. If he doesn't know, he doesn't have to say one way or the other. He can say "I don't know," or "I don't remember," or "yes," whatever his answer might be. And I don't want any characterization, frankly, of counsel's adroit question by either side. This is cross examination, the Court has a certain amount of discretion to allow in cross examination:

However, I am not going to permit Mr. Wright, you or anybody else to misquote what is in the record, or what is not in the record.

MR. SHEA: May I state my objection?

11,429 THE COURT: Yes.

MR. SHEA: My objection is this: It is clear as a matter of record that in the first place the South rejected the initial proposal.

THE COURT: Well, didn't General Lasher testify to that awhile ago?

MR. SHEA: But may I go on: It is clear that certain of the Western Railroads never accepted the proposal. It is clear, also, that after the East put in the proposal, the further proposal to the West and the South was either the alternative to the original proposal or the one that the East had put in.

Now, Your Honor, my objection to these questions is that they are so framed as to communicate the impression to the jury contrary to these facts that are established: First of all, Mr. Wright attempted, in the way he phrased the question, to suggest that all the railroads had put it in at once and in the same way.

THE COURT: Now, Mr. Shea, you are one of the best lawyers in not only the District of Columbia but in the country; likewise we have a lot of top lawyers in the country in this case, as you know. You know as well as everybody knows, that leading questions are permitted on cross examination. Now, I can't read somebody's mind, what he has in mind as a reason 11,430 for asking a question. I am going to permit the question. All right, let's proceed.

BY MR. WRIGHT:

Q. Well, let's take these railroads group by group: You made this same presentation that we just referred to that was made to the Eastern Railroads; you made it to the Western Railroads through their Traffic Association, did you not? A. Yes, sir.

Q. Western Traffic Association. And at a later date, I am not talking about 1955 but I am talking about 1956, you did receive, did you not, through that Association, on behalf of its members, a quotation which was in amount the same as to the 45 per cent on the 40,000 pound minimum and 36 per cent on the excess from that rate association on behalf of those railroads. Is that not correct?

MR. BALL: I object to the form of the question.

THE COURT: Wait a minute; ask him if he did receive.

MR. WRIGHT: I did.

MR. BALL: I object to the form of the question, Your Honor, because when he puts in that he received from this association on behalf of its members, the record fact of what they received was that there was a proposal made on some 11,431 of the members.

THE COURT: Well, can't he testify what he received?

MR. BALL: But the point of it is, it is in the form of it, but to ask for the yes or no would require him to quibble because it assumes. He is going to have to explain that it wasn't from all of them.

THE COURT: Well, I will have to tell the jury what I have told them at least maybe 20 or 30 times, I suppose, in the record already:

Questions propounded by counsel is not evidence in the case. The evidence is what you recollect the witness has said from this witness stand, and your recollection of what these documents contained, and not what Mr. Wright's question is, That is not evidence. That is a leading question, or those are leading questions that he is putting to the witness.

MR. BALL: May I add also that the record that Mr. Wright refers to is that he received it from Southwest Freight Bureau and not from the Western Traffic Association.

THE COURT: Well, will you concede that?

MR. BALL: And the Western Trunk Line Committee.

THE COURT: Let the witness testify, and General, you understand: Did you say you were a lawyer?

11,432 THE WITNESS: No.

THE COURT: Well, you are lucky then, anyway. But let the witness go ahead (laughter.)

THE WITNESS: I would like to have the last question read over to me.

THE COURT: All right.

THE WITNESS: I was confused when it was asked. (Question read:)

THE WITNESS: I don't understand what association and what railroads are referred to in this question.

THE COURT: Well, will you reframe the question?

BY MR. WRIGHT:

Q. Perhaps I misunderstood your direct testimony: I thought I understood you to say that you had subsequent to the time that the Eastern Railroads put this quotation in effect in the Eastern Territory that you referred to, presented to the Western and to the Southern Railroads an alternative proposition, to either quote that or to quote the rates in accordance with the proposal that you and Col. Flanagan had made. Am I wrong about that?

A. Well, let me explain it, if I may: We made our original presentation to the three associations. Each one was substantially like the others. At a later date, the first response we got, as we considered a responsive reply, was from

the Eastern. Upon receipt of that, which we considered responsive to a
11,433 degree, responsive enough, at least, for us to accept, we let the Western lines and the Southern lines know that the Eastern lines had given us these quotations, that we considered them responsive enough for our acceptance, and that if they preferred to use that as a base rather than our original proposal as a base, that would be all right with us. Does that answer your question, sir?

Q. Now, when was it that you say you let the Southern or the Western lines, let's take them one at a time -- know about this proposal that the Eastern lines had made to you? A. I don't recall.

Q. Well, don't you know, General, from the minutes of the meeting that are in front of you there, that the Western lines were represented at that meeting and knew full well at the time it was made what the Eastern quotation was?

A. No, I am sure they knew, probably before we did. Could be.

Q. They didn't have to rely on you? A. Not at all.

Q. For information about that, did they?

A. But they wanted to hear it from us, that that was what we were
11,434 willing to accept. I am sure it was necessary for us to formally advise them of what we had received and the fact that we considered it responsive and acceptable. I am sure we had to tell them that.

Q. But the presentations you had made, which are in evidence here, to the three associations, were all made prior to September 1955, were they not?

A. The three original presentations were made in the spring of the year, at the convenience of the three associations, as they met.

* * *

CROSS EXAMINATION OF GEN. LASHER BY MR. WRIGHT

11,439 Q. General, you have in front of you, I believe, the AWR exhibit 218, a letter from Col. Filmore to Mr. Kerr of the Southern Freight Association, dated February 28, 1955.

A. I do.

Q. Have you read that letter, and are you familiar with it?

A. I am.

Q. You notice that says in the second paragraph:

"It's emphasized that General Lasher's letter of 14 February

11,440 1955 stated that a comprehensive study indicated a more reasonable level for rates on ammunition traffic would be Column 55, on 50,000 pounds, and Column 40, on 80,000 pounds.

"It is further emphasized that this letter is not a definite proposal to establish specific rates but is a statement as to data developed by a considerable study and a request that the rail carriers furnish firm advice as to their willingness to consider negotiations."

Now, that paragraph in Col. Filmore's letter makes clear to you, does it not, General, that you had no authority to establish by any agreement between you and the railroads a general level of rates on ammunition and explosives or any other commodity. Is that correct?

A. That's not correct, no, sir. We did have such authority.

Q. You had that authority, and who gave you that authority and when?

A. Actually, the instruction was given to the Chief of Transportation, the Department of the Army, by the Department of Defense some time early in 1950, sir.

Q. And the gentleman was whom?

A. Well, the actual gentleman was a man by the name of Earl Smith who headed up the Transportation Division for the Secretary of Defense.

11,441 Q. He was the Director of Transportation, but between him and you there was whom, in the chain of authority?

A. Repeat that question, please.

Q. I say, at the top was Earl Smith in the Department of Defense; is that correct?

A. That's right.

Q. And then your chief,,the one you reported to immediately, was General Yount? A. That's right.

THE COURT: I didn't get the name. General who?

THE WITNESS: Yount, Y-O-U-N-T-(spelling).

THE COURT: Thank you.

BY MR. WRIGHT:

Q. You were his assistant.

I didn't mean to interrupt you. Just go ahead and tell me, if you will, just who authorized you to negotiate with the railroads a general level, nation-wide level of rates to be applied to all shipments of ammunition and explosives?

A. Well, the authorization, as you call it, actually was a directive from the Department of Defense to the Department of the Army and thence to the Chief of Transportation, to do this. It was a directive. He had no alternative.

Q. That was written, was it not?

11,442 A. I don't know. I was not there. This occurred before my tenure of office at that time began.

Q. You don't have any personal knowledge of what was in that particular directive; is that correct?

A. I probably saw it, but I don't recall it.

Q. You don't recall what it said?

A. No.

Q. Well, now, just confine yourself, if you will, General, to your own personal knowledge as to who authorized you to do what, and what form it was in, whether orally or otherwise.

And, if you will, just give me the name of whatever person instructed you to negotiate with the military to establish a general level of rates for the transportation of ammunition and explosives; I would like to have his name and the place where the instruction was given, and the substance of the instruction.

A. My immediate superior, orally, Major General Paul F. Yount, Chief of Transportation, United States Army, approximately the latter part of 1954, upon my coming to duty in the Office of the Chief of Transportation as his Assistant for Traffic.

Q. Now, what was it that General Yount said to you on that occasion?

A. As best I can recall, he stated that the Department of Defense had directed him to proceed with an investigation at the level of rates of ammunition and explosives to see if we could come up with some basis which would justify our asking the carriers for an adjustment of those rates.

11,443 Q. Did he say any more than that?

A. Probably, but I don't recall.

Q. Is there any other directions than that that you are referring to which you say you regarded as authorizing you to go out and by agreement with the railroads establish a general level of rates for the transportation of ammunition and explosives?

A. Well, as I stated before, I believe there is a written directive came down from the Department of Defense. I don't recall that specifically, because that was some time before I reported for duty. However, the question as to whether I personally was authorized -- you understand I was an agent of the Government, and the Government was certainly authorized, and I, as its agent, and Col. Flanagan also acting as its agent, was authorized in our official capacities to take on this negotiation.

Q. I am sure your counsel can make the appropriate argument. All I want to get from you is just the facts as to who told you what.

Now, all you were told, as I understand it, by General Yount, is that the Government thought the railroad rates were too high on the ammunition and explosives and you ought to negotiate for a reduction. Isn't that correct?

11,444 A. No --

MR. GATES: I object to the form of the question.

THE COURT: You object, the objection is overruled.

Let's proceed.

THE WITNESS: I think I have answered that question previously.

BY MR. WRIGHT:

Q. Well, is there anything in addition to that, that he told you?

A. I said there probably was, but I don't recall it.

Q. Now, I understood from your direct testimony that this study that you described that had been undertaken was with some view to establishing the rate which the Interstate Commerce Commission might consider. Isn't that correct?

A. Not exactly. We felt, after the study, that our conclusions were correct, that the rates were too high and could be reduced. We felt it so strongly that we used every possible method to induce the individual railroads concerned, through their Rate Bureaus, to reduce the rates, even to the extent

of threatening them with going to the Interstate Commerce Commission and making this an official matter before that body.

11,445 Q. Now, as far as the Interstate Commerce Commission was concerned, in order for the Commission to take action, what you would have to have would be a published tariff, would you not, filed with the Commission?

A. We didn't think so. That's a question which would have to be resolved, I believed. I'm not a lawyer. Therefore, I can't answer it. I don't think so. In my opinion, no.

Q. As a matter of fact, isn't that precisely what the proposal that you introduced in evidence here asked the railroads to do? I am referring to this statement that has been identified, I think, as TEA 5001.

A. I would like to review it, if I might.

MR. WRIGHT: Have you got this 5001?

THE CLERK: Here it is.

BY MR. WRIGHT:

Q. Now, if you will look at the second paragraph (handing): You have TEA 5001 in front of you?

A. I do.

Q. And you will note that the second paragraph says: "It is requested that your committee" -- and this is addressed to the Traffic Executive Association, Eastern Railroads, is it not? If you look at the top there?

11,446 A. Yes.

THE COURT: You mean the second sentence of the second paragraph, didn't you?

MR. WRIGHT: Yes.

BY MR. WRIGHT:

Q. The request that you were making was addressed to the Traffic Executive Association, Eastern Railroads? A. That's correct.

Q. What you say is:

"It is requested that your committee grant and publish for blanket application, except for lower rates applied, Column 55 of the applicable First Class rates with a carload minimum weight 50,000 pounds, and Column 40 of the applicable First Class rate with a carload minimum weight of 80,000 pounds, as authorized in tariffs governed by the Uniform Freight Classification and/or Consolidated Freight Classification as applicable within Official Territory and between that Territory and all other Territories."

A. And your question is, sir?

Q. Well, that's what you asked for, was a quotation that would be filed with the Commission, and published, was it not? A. No, sir.

11,447 Q. What kind of publication did you think was contemplated by that request, that you grant and publish for blanket application these rates?

A. We made it very clear in our presentation to the railroads that it made no difference to us, really, and left it to their discretion, as to whether this reduction in rates would be done by putting them in tariffs, the price lists of the railroads, which is applicable to all shippers, or whether they gave it only to the Government under what we call Section 22 of the Interstate Commerce Act.

Our idea was to get the reduction in rates, regardless of whether we got it by one route or by another. That was made very clear to the railroads.

Q. I understand that was your idea, but you did request publication, didn't you?

A. Well, "publication" is open to various interpretations, I think. It could be published in the Section 22 quotation or published in a tariff, or otherwise.

Q. Normally, Section 22 quotations are not published at all, are they?

A. Yes, they are, as far as the Government is concerned, they are widely distributed.

11,448 Q. Well, they are not published in any formal sense of the term. They are filed with the Government, and there was no requirement that they be published anywhere. Isn't that correct?

A. No, that --

MR. GATES: Objection to that question as being argumentative.

THE COURT: What do you mean by "published anywhere?" Will you clarify that?

BY MR. WRIGHT:

Q. I say, there was no requirement that they had to be brought to the attention of the general public by publication in the Traffic World or any other trade magazine or any other kind of a publication. Isn't that the fact?

A. No, that is not a fact. There were requirements in the Department of the Army that these Section 22 quotations be given wide distribution, and, as a matter of fact, in my office we had a room set aside, a rather large room, which was lined with bookcases. These bookcases contained loose-leaf folders which contained all of these Section 22 rates.

We had two tables there with chairs, pencils, and if necessary, we would
11,449 make a stenographer available to carriers who came in to search these records for the rates which were of interest to them.

So, we had the widest possible distribution among those people who were interested in the Section 22 rates, namely, the competing carriers.

Q. I understand, General, but in your own interest, of course, you didn't attempt to keep any Section 22 rates secret; so far as you were concerned, to get the lowest rate, you were perfectly willing to let any carrier know what another carrier was offering you, were you not? That, I take it, was a matter of Defense Department policy, not Interstate Commerce Act policy. Is that right?

A. It was a Regulation.

Q. And if there was to be any publication which, for the purpose of giving opposing carriers an opportunity to protest the reasonableness of a rate, that kind of publication could only occur if the rate were filed with the Commission as a published tariff. Is there any doubt in your mind about that?

A. Well, the way you placed the question, sir, makes it rather difficult to answer:

You see, the Interstate Commerce Act, and the policy of the Congress as far as transportation is concerned, allows any carrier, air, highway, rail, to transport - - and I think I am quoting exactly -- free or at reduced rates for the United States Government.

11,450 So, the level of rate, or the amount of that rate, whether it is large or whether it is small, is the rate which the Government can get, and it isn't as available through the usual channels of the Interstate Commerce Commission for the very reason that the sovereign Government can get its transportation free if the carrier so desires to carry it. All the people benefit by that free carriage, or by that very low rate.

Q. You are acquainted with the language of Section 22, are you not?

A. Some portions of it.

Q. Well, it says in substance, doesn't it, nothing in the Interstate Commerce Act shall prevent any carrier from carrying freight for the Government free or at reduced rates. Isn't that so?

A. I believe that's approximately correct.

Q. Now, Congress, when it declared that policy, made it quite plain to you, did it not, that in so far as the rates at which traffic was to be carried for the Government was concerned, those rates were to be fixed by competition rather than by the Interstate Commerce Commission. Is that correct?

A. No, I don't think that is exactly the interpretation. I believe it is based on some law with which I am not too familiar, but that is that the sovereign, sovereign State, is entitled to participate with its citizens, and in this case low cost of service which is performed for it.

11,451 Q. I am just asking you what it meant to you, General. I am not asking you for an opinion as an expert at all.

Didn't the statute mean to you that in so far as the Government was concerned, rates were to be fixed by the operation of competition rather than by regulation by the Interstate Commerce Commission or by agreement between you and a group of rail carriers?

MR. BALL: I am going to object to this repeated reference to an agreement.

THE COURT: Just a minute. You object.

MR. BALL: And to the use of the phrase --

THE COURT: You object to that?

MR. BALL: May I state the grounds of my objection?

THE COURT: No, I don't think it's necessary. Objection overruled. Let's proceed.

MR. BALL: I will request, then, a chance to file the basis of my objection.

THE COURT: All right, you may file your objection. I am not going to waste a lot of time today like we did yesterday and allow counsel to make a lot of argument.

11,452 Objection overruled. Be seated, Mr. Ball.

MR. BALL: If the Court please --

THE COURT: Just a minute. Let the jury step out a few minutes.

* * *

11,454 MR. BALL: Now may I state, while the jury is out, the grounds of my objection?

THE COURT: You may state it.

MR. BALL: Is that agreeable with the Court?

THE COURT: Yes.

MR. BALL: I object to the repeated references that have been made in the questions of Mr. Wright to the seeking of an agreement for a rate.

All that the record shows and that the testimony shows, that they sought action on the part of the railroads in reducing rates, that would not be a contract or agreement between the railroads and Government.

THE COURT: I assume the witness, if he didn't understand the question, is intelligent enough, this man is an expert in rate matters, and if he didn't understand it, he can tell Mr. Wright he didn't understand it.

Let's proceed. We are not going to make any headway if we keep having these long talks to the jury.

Let's proceed.

(Whereupon, the members of the jury returned to the courtroom and resumed their seats in the jury box.)

* * *

READ BY REPORTER

11,455 "Question: I am just asking you what it meant to you, General, I am not asking you for an opinion as an expert at all.

"Didn't the statute mean to you that in so far as the Government was concerned, rates were to be fixed by the operation of competition rather than by regulation by the Interstate Commerce Commission or by agreement between you and a group of rail carriers?"

THE COURT: General, do you understand the question?

THE WITNESS: I do.

THE COURT: If you don't understand any question, all I suggest is that you either turn to me or tell counsel you don't understand what he is talking about, or if he uses a certain word -- you know what I mean, don't you?

11,456 THE WITNESS: Yes, sir.

Well, Your Honor, there are actually two questions in this one question, and the answers are somewhat different. Might I have them individually, those two questions?

THE COURT: You may.

THE WITNESS: All right, will you read the first one, please, again?

(Thereupon the reporter read from the record as follows:)

"Question: I am just asking you what it meant to you, General, I am not asking you for an opinion as an expert at all.

"Didn't the statute mean to you that in so far as the Government was concerned, rates were to be fixed by the operation of competition rather than by regulation by the Interstate Commerce Commission " --

THE WITNESS: Not only did competition come into the play of negotiation on these so-called Section 22 rates, but also all the other normal rate factors; all the other factors upon which prices were made came into

effect. So competition was just one of those.

11,457 Now, the second question, please.

BY MR. WRIGHT:

Q. It is perfectly clear, isn't it, General, that neither Section 22 of the Interstate Commerce Act, or any other provision of law, authorized you to fix by agreement with the railroads what the rates for ammunition and explosives should be throughout the country?

A. Now, which question do you want? We still have one question pending, and then this question.

MR. WRIGHT: Well, I thought I would help you by repeating it in this form.

Give him the question, Mr. Reporter.

(Thereupon the reporter read from the record as follows:)

"or by agreement between you and a group of rail carriers?"

THE WITNESS: The answer to that is no, there was no formal agreement. The so-called Section 22 quotations for rates were made. They were made many times without any expectation of any traffic moving under them.

If the Government chose to accept them, then we used them. However, there was no agreement whatsoever made. The rate was offered, tendered, as we called it, to the Government for its use if it wanted to use it.

11,458 BY MR. WRIGHT:

Q. Not only was there no agreement made, but you were not authorized to make any such agreement, were you, by anyone?

A. I don't know what you mean by "agreement".

THE COURT: Well, explain what you mean by an "agreement", Mr. Wright.

BY MR. WRIGHT:

Q. The word agreement implies to me an understanding or contract --

A. Well, now, "contract". If the carrier, a carrier, gave us a Section 22 rate and we chose to use it, that was based upon a bill of lading and the bill of lading became a contract between the Government and the carrier. To that extent, it was a contract.

Not only I, but all the officers in the transportation business of the Army, Navy, Air Force, were authorized.

Q. And that is the only kind of contract you were authorized to make; isn't that true?

A. No, no.

Q. Well, it is a fact, isn't it, General, that your duty as a Transportation Officer, was to consider whatever quotations were tendered and then to see that the Government accepted for use the one that was the most advantageous from the standpoint of service, rates, or whatever else was involved. Isn't that so?

11,459 A. That in general is our responsibility, yes, sir.

Q. Yes, and you had no responsibility beyond that, did you?

A. Oh, we had many responsibilities other than that; many. Contractual and otherwise.

Q. I am talking about with respect to the making of rates.

A. Well, we could go before the Interstate Commerce Commission on rates which were published in tariffs, protest them, file them, do all the things that were normal to the operation of the pricing of transportation.

Q. In so far as the Government is concerned, if I understood your prior testimony correctly, it was that whenever any quotation, or Section 22 quotation, whatever rates were available, the Government examined them. If the rates and service offered were the same, the traffic was divided; otherwise, if some mode of transportation or some carrier had offered an advantage to the Government, either in terms of rates or service, that quotation would be accepted; is that correct?

A. I would like to put it in my words. It's not exactly the way --

11,460 Q. What is wrong with the words I just used?

THE COURT: Wait a minute; he can answer in his own words:

Let the witness answer in his own words.

All right, you may answer.

THE WITNESS: We had the tariff rates and we had Section 22 rates. We had various factors of laying down the product from one point to another; the full cost over the entire thing, including handling, and so forth. I mentioned the disability, yesterday. All of these things were taken into consideration.

The rates in some cases were only a part of it. The actual rates from A to B.

Taking into consideration all these costs, plus the service factor, and of course in time of war that is very, very important -- taking all these factors into consideration we chose the mode of transportation and the carrier which performed the service that we wanted at the most economical cost, considering all these factors.

BY MR. WRIGHT:

Q. You chose the lowest cost rate that was tendered to you, isn't that correct?

A. Not necessarily so. Sometimes the service involved, the service that the Government required was far more important than the few dollars different in rate, and we chose the service.

11,461 Q. You chose the proposal which best served the requirements of the Defense Department at the particular time that proposal was made; right?

A. I will go along with that, yes.

Q. Now, that is why I was a little puzzled by your statement. I thought I heard you say on direct examination that if the railroads had not accepted the proposal you made, their share of the traffic would have progressively decreased until it might represent zero.

Now, what happened as to how what share of the traffic they got depended on getting the rate, did it not? Not just on the particular rate that they might quote?

A. That's correct.

Q. But on the rate that the competing carriers might quote; isn't that true?

A. Plus all of these other costs and other factors involved.

Q. Yes. I assume throughout you continued to follow this same policy, did you not, of getting transportation for the Government at the lowest available cost?

A. Again, when you say "lowest available cost", I have to take issue because many times the cost was the least important factor.

11,462 Q. Well, continuing to accept whatever quotation you got from anybody that offered you what you thought were the best terms?

A. Well, I think I have answered the question, sir. You are putting words in my mouth that I don't --

THE COURT: Don't let him put words in your mouth.

THE WITNESS: I am not -- I don't want him to.

BY MR. WRIGHT:

Q. I don't want to put any words in your mouth, General. I want to make it perfectly clear, though, what the consequences of not doing, or doing, anything you might request might have for a particular carrier or group of carriers.

And as you pursued, as you say you were pursuing, the policies of the Defense Department that had been pursued all along, nobody's share of the traffic was going to be reduced to zero unless he failed to at least meet his competitors in terms of service and cost; isn't that correct?

MR. GATES: Could I have that question repeated?

THE COURT: Yes.

(Pending question read:)

THE WITNESS: Well, there are two questions there.

11,463 MR. GATES: And I don't understand the question.

THE COURT: Wait a minute now; you say there are two questions in there in one?

MR. GATES: There are at least a half a dozen and I don't understand any of them, Your Honor.

THE COURT: I will ask Mr. Wright to reframe the question, please.

BY MR. WRIGHT:

Q. I understood you to say on your direct examination, General, something that puzzled me, and perhaps I didn't understand you correctly, and I would like to have you correct me on that first:

I thought I understood you to say that if the railroads did not accept this proposal that their share of the traffic would necessarily have been reduced to some point where it might approach zero.

Was that what you said, or wasn't it?

A. Substantially. It might approach zero.

Q. And, actually, the fact is, is it not, that whether or not their share decreased or increased didn't depend so much on whether they accepted this particular proposal as to whether or not whatever they did propose was equal to or better than what their competitors proposed?

A. I don't understand the question.

11,464 Q. That is too much for you to comprehend?

A. Yes.

MR. WRIGHT: Read it again.

THE COURT: The jury will disregard the last remark of Mr. Wright.

Now let's proceed.

(The pending question was read:)

THE WITNESS: I still don't comprehend that.

THE COURT: You don't understand the question?

THE WITNESS: No, I think it could be put much simpler.

THE COURT: I will ask you to reframe your question.

MR. WRIGHT: I'm sorry, Your Honor, that's the best I can do with that one.

THE COURT: Well, let's proceed to something else.

BY MR. WRIGHT:

Q. Getting back to this proposal that you and Col. Flanagan made, do you know of your own knowledge why it was that the proposal here was -- that there was no proposal, for example, to reduce the 65 per cent rate on 40,000 pound shipments?

A. Actually, we weren't interested in the low tonnages, as I explained yesterday. We wanted the high tonnages in order to utilize as few

numbers of units of transportation as we possibly could; and by the heavier loading produce about the same revenue as the lesser loading would.

11,465 We attacked this primarily on the basis of the ability of the Government to load this particular commodity very heavily. Therefore, the amounts of ammunition, although we had many number of shipments of smaller amounts, the percentage of those shipments as compared to the whole, tonnagewise, was very, very low.

Our major savings available to us were in this other area.

That is why we concentrated on it rather than at the lower minimums.

Q. Do you know of your own knowledge, General, why in this proposal 55 per cent of First Class was proposed for 50,000 pound shipments, rather than 45 or 36 or some other figure?

A. Well, you see, we didn't make this as a proposal. We stated in our letter we thought this would be a more equitable level of rates, a better one. If they had a better idea on it, why, we were willing to listen.

We asked them, "Are you willing to negotiate?"

Now, up to the time we put these figures in this letter of 55 and 40 per cent, we were considering a good many such figures. Actually, we were working up from the bottom and we almost asked for a considerably smaller percent of First Class. Yet we weren't sure in our own minds that we could fully justify that.

11,466 We hit upon 55 per cent and 40 per cent as being levels of rates that our studies justified. That's the reason we went to those particular figures.

Q. This study in this proposal was considered by a great many people within the Department before it was actually -- before you and Col. Flanagan were authorized to present it to the railroads, was it not?

A. Well, I don't know. I don't know how many. A great many, you say. I don't know.

Q. Well, it represented, in any event, certainly the work of other people than yourself?

A. Oh, yes.

Q. And it represented, I suppose, to some extent, the judgment of others than yourself? A. The what of others?

Q. The judgment. A. Yes, yes.

Q. And I suppose it is conceivable, is it not, that somebody who exercised the judgment in that connection might have given some thought to the consequences of a lower figure than that upon the ability of truckers to compete with rail carriers for this business? You think that is possible?

11,467 MR. McGLOTHLIN: I object.

THE COURT: You object.

MR. McGLOTHLIN: I object.

THE COURT: Overruled.

Read the question.

(Pending question read:)

THE COURT: Do you know that, General; do you know that?

THE WITNESS: Yes, that was considered, at all levels of the study.

BY MR. WRIGHT:

Q. Now, I want to get back to where we left off last night, of what was actually done by the railroads in response to the proposal that was made, and I want to call your attention to this exhibit which is in evidence here, which indicates on it the explosives routes over which the plaintiff in the case, Riss & Company, was transporting ammunition and explosives during the period '54-'57.

Now, I believe you said that you were aware that in October of 1955 the railroads had put into effect within the area marked as Eastern Territory there, this rate structure whereby shipments of 40,000 pounds or more would move at a rate of 45 per cent on the first 40,000 pounds, and 36 per cent on the excess.

Do you recall that, General?

11,468 A. I believe those figures are approximately correct.

Q. And you do recall that that was put into effect in October of 1955, and within the Eastern Territory then?

A. The Eastern Territory was the first one to come in. I don't recall the exact date.

Q. Within the East?

A. Yes.

Q. Did you observe, General, the impact of that reduction upon the respective relative shares of trucks and rails?

A. I don't believe I did.

Q. In Government traffic?

A. I don't recall it, sir.

Q. It was not brought to your attention by anyone?

A. Oh, the truckers brought it to our attention as soon as they found out about it, but we made no study of it at that time. We were still hopeful that all of the railroads would come in, and we were keeping the pressure on them to do so.

Q. Didn't you make some spot checks to determine what the impact of that was on the truck competition?

A. No, I did not.

Q. Do you know whether any were made or not?

A. I don't recall of any.

11,469 MR. WRIGHT: I would like to have marked for identification with the next Plaintiff's Exhibit number, this document.

THE CLERK: Plaintiff's Exhibit No. 285 for identification.

(Thereupon a photostatic copy of a letter Leonard Hill to H. C. Barron, Subject, Ammunition, Rail v. Truck for account of Army and Air Force, dated April 30, 1956, was marked Plaintiff's Exhibit No. 285 for identification.)

MR. WRIGHT: This is a four page photostat which purports to be a copy of a letter from Leonard Hill to H. C. Barron, subject, "Ammunition, Rail versus Truck, for account of Army and Air Force," dated April 30, 1956.

The letter consists of one page, and having three pages of attachments.

THE COURT: Have you shown it to counsel for the other side?

MR. WRIGHT: I will now, Your Honor.

THE COURT: All right.

(Letter passed to counsel:)

MR. BALL: The Court understands that while this has been from our files, there have been thousands of papers that we don't always have readily available.

THE COURT: I am sure the jury can appreciate that.

11,470 BY MR. WRIGHT:

Q. General, I would like to have you read the letter that has been marked for identification as 285 for Plaintiff, and you were acquainted with the signer and the receiver of that letter, were you not?

A. I was.

Q. Mr. Hill, who wrote it, was the Washington representative of the Western Traffic Association?

A. Right.

Q. And Mr. Barron was the Chairman of that Rate Association?

A. That's right.

Q. That was one of those to whom you had made your presentation; is that right?

A. Mr. Barron and his members.

Q. Have you had a chance to read the letter, General?

A. I don't believe so. Do you wish me to read it?

Q. Yes, just read it to yourself.

A. All right. (Inspecting letter.) I have read it.

I haven't read the attachments, but I have read the letter.

Q. Now, were you familiar, General, with the spot checking operation that Mr. Hill refers to there?

11,471 A. No, not specifically.

Q. Had you heard about it or were you aware that that was being done?

A. Well, from time to time there are many checks of one kind or another made into our traffic movements, both as to tonnage, costs and various other things. Those are details with which I was only generally aware and in no wise specifically engaged in.

Q. Well, you were aware of the fact, were you not, that an effort was being made at least by the railroads to determine what the impact of that cut had been on the ability of the truckers to meet it?

A. Well, again, I would like to repeat that after the presentation to the railroads and our suggestions as to a level of rates, I remarked that we kept the pressure on them as hard and as long as we could. Once we broke the dike, just a little bit, then we had something to go by to go on to the other groups of carriers and use that as a club on them to get them to come along.

I repeat that we used every device we could, and I am sure that where statistics showed that the Eastern lines were wise in what they did, by virtue of getting more tonnage under this better price to the Government, the people on my staff and on Col. Flanagan's staff used that information to say to the other lines, "See what the East has done by virtue of coming down."

11,472 I'm sure that was done; if it wasn't, I am disappointed in the staff I had.

Q. Now, if you will turn to the second page there, you could see right at the top, can't you, what Mr. Barron in the West was being told as to what the East had been able to do with that cut? Do you notice that? What is the figure you see there for eastern, or within the East, as to the percentage --

MR. GATES: If the Court please, I object.

THE COURT: You object?

MR. GATES: On the ground the document is not in evidence.

THE COURT: All right.

Suppose you have General Lasher read the first page, so the jury will understand what he has before him.

MR. WRIGHT: Surely.

Do that, please, General.

MR. GATES: I will object on the ground that document has not been identified or authenticated. It is between Mr. Hill and Mr. Barron and there is no indication he ever saw the letter before.

MR. WRIGHT: If there is any question as to the authenticity, of course it should not be used at all. I do not believe there is.

11,473 Now, Mr. Ball, I think, just stated this is a letter which came from the files --

THE COURT: Did this photostat copy of a letter of April 30, 1956, come from your files, Mr. Ball?

MR. BALL: It did. It was produced.

THE COURT: And do you object on the ground it is not authentic?

MR. BALL: Not as far as we are concerned.

THE COURT: Do you object to the witness reading the letter?

MR. BALL: Well, I think it should be offered into evidence first, before it is read.

THE COURT: Well, let me see if it is admissible.

(Document handed to the Court:)

THE COURT: Do you want to offer this in evidence?

MR. WRIGHT: Why, yes.

THE COURT: All right, I will admit it over objection.

(Thereupon letter, Hill to Barron, marked Plaintiff's Exhibit No. 285 for identification, was received in evidence.)

MR. BALL: I might make clear, as far as the AWR, we had no objection.

11,474 THE COURT: You had no objection, but Mr. Gates objected. Is that correct?

MR. GATES: I think it is improper to introduce it to this witness, Your Honor, who has never seen it before.

THE COURT: Well, let's find out.

BY MR. WRIGHT:

Q. Would you read it, General?

A. This is dated April 30, 1956. Subject, "Ammunition, Rail versus Truck, for account of Army and Air Force.

Addressed to Mr. H. C. Barron, Chicago.

"Dear Mr. Barron:"

THE COURT: Now, will you identify Mr. Barron again for the jury, General?

THE WITNESS: Mr. Barron is the Chairman of the Western Traffic Association, one of the three bodies that we appeared before in trying to get these rates reduced.

THE COURT: One of the rate bureaus.

THE WITNESS: One of the rate bureaus, rate associations.

THE COURT: All right.

THE WITNESS: Reading:

11,475 "Dear Mr. Barron:

"Supplementing my previous letter in regard to the above subject:

"When I wrote you on March 13th the detailed statement for the month of December had not been completed by the Army. Since that time I have been advised by the Army that the method of compiling this information has been changed. Attached is a statement showing information for the country as a whole for the period December, 1955 to March, 1956, both inclusive. This is on the new basis being used by the Army and represents a check on all TS routing orders issued during the months covered by each statement. It is therefore more accurate than the previous figures furnished, the basis for which has previously been explained.

"The attached statements include the information furnished you with my letter of March 13 as covering Western Territory, also

between Western Territory on the one hand and SFA Territory on the other" --

That is Southern Freight Association Territory --

" -- on the other hand for the months of December, 1955 and January and February, 1956.

Yours very truly,

"Leonard Hill."

11,476 BY MR. WRIGHT:

Q. General, do you know what the "TS" reference there means?

A. Well, "TS" is just the prefix that was used as a filing reference by the Army in identification of its routing papers.

Every time any tonnage was routed, a route order was issued to indicate how that movement would go, by what railroad or by what truckline or truck lines. That was given what we called a "TS" routing. It was merely an indexing file.

It usually had a number after it.

Q. Now, over on the first page there which contains the January figures you will notice there is a figure for the rail and truck shipments for the Army and Air Force for certain spot checks made on days in January. Isn't that right?

A. It appears to be that, yes.

Q. And the January figures, according to those spot checks, are what percentage for rail -- this is within the East -- and what for truck?

A. You want just the percentages?

Q. The total percentage figure he has at the bottom of January thereon.

MR. BALL: May I approach the bench?

11,477 THE COURT: Yes.

(Thereupon counsel approached the bench and out of the hearing of the jury conferred with the Court as follows:)

MR. BALL: I want to object to question of the witness on this letter. These are figures that he has indicated he has no personal knowledge about. They are not from the Government files. They are figures that apparently were called to the attention of the Western Traffic Association after the rate cut had been made, the last of the rate cuts.

So the possession of this knowledge cannot in any way affect the issues and therefore the matter is irrelevant.

THE COURT: I will hear from Mr. Wright.

MR. WRIGHT: These are figures, if the Court please, which are General Lasher's figures. This is Army data that he is reporting. I think it is perfectly proper to examine him on that data.

THE COURT: On his knowledge, you mean?

MR. WRIGHT: Yes.

MR. BALL: On his knowledge, but not on the figures.

THE COURT: I will overrule the objection.

(Discussion off record:)

11,478 MR. GATES: I want to interpose an objection to this.

Here is a contract between an agent of the Western Traffic Association and his principal. The General had nothing to do with the preparation or the seeing of it.

Now, if Mr. Wright wants to ask him if the figures there are correct, and the General can say yes or no, I have no objection. But to put these figures before this jury without any identification of any kind whatsoever I think is highly prejudical and error.

MR. BALL: Yes, And as if the General by his testimony were sanctifying these figures. That is the problem.

MR. GATES: If he wants to lay a proper foundation that these figures are correct and that the General knows about them, then I have no objection.

THE COURT: He is familiar and he knows these people, both Mr. Barron and the other one.

MR. GATES: I do too, Your Honor, but that doesn't mean I know anything about these figures.

MR. WRIGHT: The figures are a very part of the pressure that he has just been talking about.

THE COURT: All right, you have it on the record.

(Thereupon counsel resumed their places at the trial table and the following occurred:)

11,479 THE COURT: All right, Mr. Wright.

BY MR. WRIGHT:

Q. I think the question was directed, General, to that figure there which showed the railroad percentage within East for January 1956.

A. Whether or not this is the entire movement of ammunition during January or not, I don't know. There are only four days involved.

Q. That is a spot check, clearly on its face, is it not?

A. I don't know. I don't know whether it is a spot check. This is a letter from an employee to his employer. Whether he has picked his spots or not I don't know.

Q. He indicated --

A. There are only four days involved in January.

Q. He indicates the days involved, does he not, right on the face of it?

A. 18, 23, 25, 31.

Q. Those were spot checks, presumably made on those days, weren't they?

A. I don't know that they were spot checks.

Q. Well, they were only on those days. There is no question about that, is there?

He does not purport to show figures there for any other days than those that are stated?

11,480 A. That's correct. That's correct. There are only four days involved. That's why I say I don't know what the entire month was.

Q. Yes, of course.

A. All right, for these four days, 94.76 per cent by rail, 5.24 per cent by motor.

Q. And that was only for the Army and the Air Force. That's correct too, isn't it?

A. According to the heading.

Q. There are no Navy figures in there?

A. Apparently not.

Q. Now, at that time, in January, the only area in which this 45-36 per cent had been put into effect was within the East, was that not your recollection?

A. I don't recall just when the dates were, exactly, when the East came in or when the West came in. I don't recall vis a vis these particular dates.

MR. BALL: If the Court please, I think the record shows that this letter was dated after the last --

THE COURT: What is the date of the letter again?

THE WITNESS: The date of this letter is April 30, 1956.

MR. BALL: That was after the West came in, then.

THE COURT: All right.

11,481 THE WITNESS: This was after that.

BY MR. WRIGHT:

Q. I want to get your own best recollection, General, if I can, as to when these various areas that are portrayed on the map there, Exhibit 2, that the rails reduced to that 45-36 basis.

Within the East your best recollection was it was toward the end of 1955, and that was the first section, was it not?

A. That was the first.

Q. Then you recall that sometime in March the West or parts of the West, came down to that level; is that right?

A. Roughly early spring, I would say.

THE COURT: You are talking about March of '56?

THE WITNESS: '56.

THE COURT: All right.

BY MR. WRIGHT:

Q. Then after the South came down to that level; is that right?

A. As I recall it was sometime then.

Q. They were the last. When the East --

A. Just a moment. When you said came down to that", they didn't, by no means, all of them came down to the same thing, the same rate. By no means. So we can't say they all, the Southern some time later came down to that. The Southern came down to a different basis than the West, than some

of the carriers in the West. Southern came down, Southeaster lines came down to a different basis than the lines in the East.

11,482 So there was quite a variety of combinations --

Q. Maybe I misunderstood you. I thought -- my question was specifically with respect to this 45 per cent rate on 40,000 minimum and 36 per cent on the excess.

Now, is there any doubt in your mind that ultimately both the Western and Southern railroads did come down to that are, in areas?

A. Yes, there is, but I don't recall on that.

Q. You don't?

A. No.

Q. Do you know what the fact is on that?

A. Not exactly.

Q. Don't you recall actually that the West, at the time that the East went down to that 45-36 level, only reduced the rate to 55 per cent on 60,000 pounds minimum? Do you recall that?

A. Not specifically, no. I never did fix in my mind the exact percentages of first class at the various territories and various railroads exceptions, and so forth took.

11,483 I knew that in general I kept in touch with it, yes. I knew that as far as our heavy loading of ammunition was concerned we got substantially what we wanted.

The other was of minor importance to us. I did not fix it in my mind, and I cannot quote these various rate levels. It's a matter of record, however.

Q. You knew it wasn't until the spring of 1956 that the Western roads gave you any reduction at all other than the 55 on the 60,000 pounds shipments?

A. I know generally that the East came in with its proposal in the fall of '55, that the Western lines came in, part of the Western lines came in in the early spring of '56, and that some considerable time later, after considerably more pressure, the Southeastern lines came in, but I don't recall when.

Q. Now, you knew, did you not, that the 55 per cent rate had relatively little impact on the relative position of the trucks and the rails as far as the ultimate share of the traffic is concerned; isn't that correct?

A. No, I don't know that I knew that specifically.

Q. Don't you know that that was presumably part of the pressure that you say was being applied, was the fact that where they merely went down to 55 per cent there continued to be a large amount of truck competition?

11,484 A. No, I am not sure that I knew that.

Q. You were never made aware of that?

A. I might have, in the course of the negotiations.

You see, I did not negotiate in this except for the initial appearance before these three Rate Bureaus. My remarks before them and my arguments before them were merely introductory, they were as persuasive as I could make them, and from there on I was not a party to any of the negotiations.

Q. Did you know, General, that in that area west of the blue line on Exhibit 2, and north of it, the railroads never did at any time put into effect a rate below 55 per cent?

A. I knew that in the West the meeting of our proposal was not as widespread as it was in the East.

However, as I said yesterday, the areas that were covered were the areas in which we had the greatest movement and therefore where the greatest savings to the Government were, and we considered it --

Q. This pressure you say you put on, this was in the form of the presentation you previously identified here, these figures that have been worked up, that you and Col. Flanagan presented to the various Rate Associations?

A. I would like to have that question read again.

(Pending question read:)

11,485 THE WITNESS: Well, I don't know of to what.

You mean the formal presentation that was originally made to the three Bureaus?

BY MR. WRIGHT:

Q. Well, are you referring to something else's pressure, other than your formal presentation, as to what you thought or as to the effect that you thought the rail rates were unreasonably high and what you proposed in the formal presentation would be a more reasonable basis?

A. As far as I personally was concerned, the pressure was mostly conversation between me and various carrier representatives, either individual railroads or Bureau representatives, and it went so far eventually as to my authorizing the movement through Earle, New Jersey, of a retrograde or returning movement of ammunition. That pressure was in various sorts.

Again, I repeat, the threat of taking this to Interstate Commerce Commission, we kept uppermost in their minds.

As far as Col. Flanagan's staff was concerned, I am not specifically familiar with what they did, but this is apparently one of the proofs that they were keeping pressure up.

11,486 BY MR. WRIGHT:

Q. As long as they never published or filed any of these quotations with the ICC, that was kind of an idle threat, was it not?

A. By no means was it idle.

Q. You thought the ICC had authority to provide a level of Section 22 rates which everybody would have to adhere to?

A. Again, I repeat, we didn't ask for a publication in tariff nor a Section 22 quotation. We asked for an adjustment of rates commensurate with the proposals and evidence we had submitted. I might say that was drawn up exactly as though we were a commercial shipper, going to the highway for a reduction in rates. The very same factors as they would use in argument, we used in argument. Had we had to go to the Commission, we would have attacked the tariff and not Section 22. It was by no means an idle threat.

Q. The argument you used embodied in TEA 5001 was pretty much an argument of the same kind that the Government had been making since 1947 in the Reparations case then pending before the Commission, was it not?

A. No, it was not.

Q. What figures have you got? What kind of figures have you got in this TEA 5001 that were not relied upon by the Government in its efforts to get these rates reduced in the Reparations case.

11,487 A. The periods were two entirely different periods of time, as I recall. The situation of the Government during the period covered by the War Materiels Reparations Cases, or case; the country was at war. The situation involved in that was considerably different. The level of rates were considerably lower. Subsequently rates had increased to a point where we felt they were too high. The handling of our traffic and the movement of the large tonnages they had, particularly of ammunition, was an entirely different pattern in war than in peacetime, naturally. We know that. Between the Reparations Case and the filing or presentation that we made before the carriers, there had been several across-the-board rate increases. Now, as I recall it, the rate that we finally decided as a rate to place in this letter as a suggested basis for arbitration, was still a higher rate than the rates that we talked about in the Reparations Cases.

Q. Now, what period did these figures cover here that you were just referring to in your presentation?

A. I would have to refresh my memory to find it.

Q. Have you got 5001?

(The clerk produced the exhibit.)

A. Well, the first table covers January 1, 1953 to December of the year 1953.

11,488 Q. Are you under the impression the United States was not at war during part of that period?

A. 1953?

Q. Yes.

A. Well, I was in Korea the first fourteen months of the war, personally, Beyond that there was some war. We may technically have been at war. I don't recall.

Q. Actually, most of the figures you have cover 1951, 1952, 1953, do they not?

A. Could be. I have not examined them carefully enough.

Q. Well, whatever period they cover it is apparent on their face.

I gather, as far as the railroads themselves are concerned, they took a somewhat different view of the impact of these reductions that you were seeking on the Reparations case than you did, is that correct?

A. Well, I do not know what view they took. The view expressed by them, there was a variance in some cases, yes.

Q. And actually, just before you made these presentations, they had prevailed before the Commission on their contentions that that level of rates which was involved in the Reparations Case, 65 per cent of First Class, was not an unreasonably high rate, is that right?

11,489 A. I believe so, Yes.

Q. Now, point to me some argument in your presentation here that was not made by the Government in the Reparations case, itself, for a reduction in the rate level.

A. I could not do that. I did not follow the Reparations cases. It went over many, many, many months. The presentation was made by the Department of Justice and not the Department of Defense. I could not possibly make such a comparison.

Q. Actually this effort to get these rates reduced did not originate with you at all, did it? A. No.

Q. The Government had been trying persistently ever since 1947 to get the railroads to submit lower quotations than they were submitted on ammunition and explosives, is that correct?

A. I do not know. You state it. I do not know.

Q. You were not aware that had been a constant effort by your predecessors?

A. We are always trying to reduce the cost of our transportation. That was our responsibility to the Government. I will go that far.

Q. I take it you, yourself, really do not, as you sit there, have any firsthand knowledge whatsoever as to what moved any of these railroads to put the reductions into effect that they actually put into effect in the fall of 1955 and in the spring of 1956?

A. We wanted to think it was our persuasive argument as presented. I don't know.

Q. My question is not what you think. I take it you were never given the privilege of attending any meeting of the rate associations at which they discussed among themselves the why's and wherefores of these rate reductions, is that correct?

A. That is correct.

Q. Now, any statements you may make as to why they did or did not do anything merely represent impressions or opinions of your own rather than facts. Is that a fair statement?

A. It is conclusions of what I presumed to be cause and effect.

Q. Yes, but I suppose that whatever else your duties involved, one of them really was not advising the railroads on how to run their businesses?

A. Heaven forbid.

Q. It is conceivable at all times the railroads in deciding what to do about any rate proposal, whether made by you or anyone else, were acting in the light of what they conceive to be their own --

11,491 MR. GATES: I will object to that question. "It is conceivable." That is highly speculative.

THE COURT: If he cannot answer the question --

THE WITNESS: I have no idea what the railroads, what conception the railroads had in the area covered by the question.

* * *

Q. There is only one thing more I had, General, and now, you recall when your deposition was taken in Chicago in January of this year?

11,492 A. Yes sir, I do not recall the date.

Q. Mr. Ball and I cross examined you at that time.

A. Yes.

Q. You recall there was a question there about your leasing of piggyback railroad equipment to the Rock Island, Chicago, Rock Island Pacific Railroad?

A. They are one of our lessors, yes.

Q. That was one you did not mention here. That is a fact that you do mention piggyback to the Rock Island?

A. Yes, perhaps you misinterpreted. I stated that the Baltimore and Ohio Railroad, and the Chicago Northwestern Railroad were two major railroad customers. However, we do have other railroad customers in much, much smaller amounts.

On the other hand, our primary business is with the shippers, not the railroads.

MR. WRIGHT: That is all.

REDIRECT EXAMINATION

BY MR. BALL:

Q. Just three questions. In the first place, you have a subsidiary company to the North American Car Company by the name of Emery Transportation Company?

A. We do.

11,493 Q. What is the name?

A. It is primarily to take care of one of the piggyback plans. We jointly own the subsidiary, Emery Transportation Company, which is one of the fresh fruits and vegetables companies by highway. In order to take advantage of this growing coordination, the integration of various modes, we joined a subsidiary and took advantage of the trucks where it was best suited and the advantage of the railroad where they were best suited.

Q. General, I want to ask you one more question on that subject. If you lease a car to a shipper, the shipper tenders that car to the railroad, then can the railroad refuse to handle that car?

A. Only if it is mechanically imperfect in some way.

Q. It has to accept it whether it likes you or not?

A. Oh, yes. It is the ownership and the lessee, to all intents and purposes.

Q. When you and Colonel Flanagan made that presentation and request to the railroads, was it your intent to ask for a rate that would drive the truckers out of business?

A. Oh, no. On the contrary.

11,494 You see, one of our main jobs in the Army, Marine Corps and everything, was getting ready for war, so everything we did must have that in mind. It has been invariably the case throughout history that transportation is in short supply. We know the sinkings in World War II, the shortages of gasoline, rubber, diesel fuel, manpower and everything else. All of that made transportation short. We did everything we possibly could to preserve all of the pieces of transportation possible, whether barges, rail lines, trucks or whatnot. So, to have taken action by which we knowingly would be destroying some of that potential transportation for the future would have been out of the question.

* * *

11,499 DIRECT EXAMINATION OF COL. FLANAGAN BY MR. SHEA

ANDREW PAUL FLANAGAN

was called as a witness and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHEA:

Q. Colonel, will you state your full name and address for the record.

A. Andrew Paul Flanagan: Army Chemical Center, Maryland, Quarters 257.

Q. Colonel, you are here under subpoena today?

A. Yes sir.

Q. Will you state your rank and your present assignment?

A. Colonel, United States Army, Transportation Corps, assigned as Traffic Consultant for the United States Army Corps, and Sub-Staff Officer for the Chief Chemical Officer.

11,500 Q. You have been here, I take it, during the whole of General Lasher's testimony, and you have heard that testimony?

A. That is correct.

Q. Colonel, will you tell us, briefly, your educational background and your experience in traffic matters with special reference to your experience in rate matters.

A. Yes, sir. My civilian education, public school system in the East Bay area, California. I graduated from the University of California in 1932 with a BA Degree. I took post-graduate work, for Master's Degree, at the University of Washington. That is for my civilian education.

For my background, graduating from the University of California in 1932 I had various odd jobs and was finally employed by a Class I rail carrier and arose from file boy to City Freight Agent, was called to active duty as a Reserve Officer in 1941. I elected to accept a regular commission in the army rather than to return to my former employer.

Q. Following that, do you mind going through your career and telling us in particular about your experience in traffic?

A. My career as to civilian life, in transportation, export clerk, weighting division clerk, freight house, and finally city freight agent. For --

11,501 Q. You brought us down to 1941, now after 1941 what was your experience?

A. In 1941 I became transportation officer at a general level, and served in that capacity until 1946, at which time I went to the European theater. In the European theater I was rail transportation officer, Executive Officer for an area transportation office, served with constabulary on the G-4 staff which would be Logistics, primarily, returning stateside; a period of duty in ROTC, Officers Training at the University of Washington, where I had the Transportation Corps activity there. Then a year's training with industry, on active duty with the army, with the general traffic department at Sears-Roebuck & Company: Then to Washington, D. C., where I was assigned to the Freight Traffic Division, held various positions in the freight traffic division.

Subsequent to that time, to school --

Q. What was that period you were in the Freight Traffic Division?

A. Roughly August, 1953 until about June of 1957.

Q. Will you tell us in some detail exactly what your position was at that time, your function?

A. Yes, I arrived in August of 1953, and was assigned initially as Chief of the Freight Movements Branch, which concerned itself with the routing of freight and the quoting of rates that were available.

11,502 About October of 1953 I was assigned then as Chief of the Rate and Adjustment Classification Branch. Subsequently re-termed Negotiations Branch, and I served in that capacity until I departed in 1957.

Q. Now, will you tell us what your duties and functions were in that capacity?

A. As Chief of the Rate Adjustment Classification Branch, subsequently the rate negotiations branch. It was the responsibility of myself and my branch to examine all of the going levels of rates available to the government -- and I am speaking of the military -- and to look at those rates and determine whether those rates were considered reasonable or not. If the rates were not considered reasonable, it was the duty of my branch to approach the carriers and submit a communication to them for their consideration to establish rates we thought were reasonable.

Q. How many men did you have under you in that capacity?

A. This varies. To the best of my recollection sixty or seventy-five at various times.

Q. Then in 1957, will you bring us down to that?

A. I went to the Army Staff College at Norfolk, Virginia in 1957. Subsequent to that time to the Military Assistance Group in Korea where I was adviser of Transportation Affairs to the Chief of the Korean Army.

11,503 Q. After that?

A. After that I returned to the ports here Stateside. I am now with the U. S. Army Chemical Corps. I omitted one thing in connection with, perhaps you might term civilian education. I am licensed to practice before the Interstate Commerce Commission.

Q. Now, Colonel, referring you to that period October, 1953 to April 8, 1957, when you were Chief of the Rate Classification Branch, had you been ordered by higher authority to make an analysis of the rail rates on ammunition and explosives?

A. That directive was in existence before I assumed my duties. My predecessor at the time I arrived was working on this same problem. We

had been directed by the Department of Defense -- to the best of my recollection, this direction was informal, it was in written form -- and it directed that the Secretary of the Army would have the responsibility for preparing a case on the rail rates, and statistics data, figuring witnesses, with the conclusion I believe -- and I believe this piece of paper that we would ultimately approach the ICC for the establishment of reasonable rates.

The other services as I recall were furnished copies of this directive and were informed they would assist the army in this task.

11,504 Q. After you came into this position as Chief of the Rate Adjustment and Classification Branch, was the preparation of this study under your immediate direction?

A. Yes, sir.

Q. And it was carried, was it, to a conclusion?

A. Yes, sir, I believe so.

Q. You have heard General Lasher's testimony. Does it accord with yours that you decided that this would be taken up and presented to the Rate Associations of the several territories?

A. What?

Q. Was it determined you would attempt to negotiate rates on the basis of these studies?

A. I was so directed.

MR. SHEA: May I have TEA 5001, AWR 231 and AWR 233?

DEPUTY CLERK: Yes (handing to counsel.)

BY MR. SHEA:

Q. Colonel, I show you what is designated TEA 5001 and AWR 231 and AWR 233. Do you recognize those as the formal presentations which were prepared by you for presentation respectively?

A. Of course, I have not had the opportunity to look at them carefully. They appear to be, yes, sir.

Q. I know that, sir. Colonel, you take adequate opportunity to check them and then response to my questions -- formal Presentations to the TEA and the Southern Freight Association and Western Freight Association, Western Traffic Association.

11,505 A. I identify them as such.

MR. SHEA: Your Honor, with your permission I am going to let the jury get one of these so they will be able to follow Colonel Flanagan. I will let them have the presentation of the Southern Freight Association.

(Documents were handed to the jury.)

BY MR. SHEA:

Q. Now, Colonel, will you tell the jury, refresh its recollection as to exactly what the proposal was that was made to these three Associations?

A. The proposal was made, as indicated here, on behalf of the Department of Defense, to establish a level of rates deemed reasonable by the Department of Defense. Column 55 or percentage of First Class Rate on 50,000 pounds carload, and Column 40 or 40 per cent roughly, of the First Class Rate, on carloads, where the weight was 80,000 pounds.

Q. Had you concluded as a result of your study, Colonel, that these rates would be fully compensatory to the railroads?

A. Yes, sir, we had, and so presented in our presentation.

11,506 Q. You considered that your presentation demonstrated that it would be highly profitable to the railroads?

A. I did. I think the rates could have been lower and it was discussed at one time amongst ourselves, the Army, Navy and Air Force and Marine Corps.

Q. Colonel, I think it might be helpful to the jury if you, by reference to your tables particularly, in your presentation, would point out to the jury what the basis was leading you to the conclusion that these rates would be compensatory and highly profitable to the railroads. I would like you to, if you will, Colonel, just to identify the schedules that you will be speaking of, so that the jury may refer to it.

What I would like you to do is in making reference to those schedules, to point out to the jury the basis for that judgment.

We are using the exhibit, Southern Freight Association.

A. Yes, that is what I am looking at. I did not want to waste the jury's time, and identify things quickly to them before I proceeded.

Q. Yes.

A. I believe the first exhibit we are talking about the rate being compensatory, it might be worth examining, and that is exhibit 3 which shows the Earnings for a Several Years Period of time here.

11,507 Q. Let us see if the jury has in front of them, exhibit 3. Can you identify that further? What sheet is that?

A. This shows Exhibit No. 3, the Comparison of Percentages of loss and damages to revenues and damage to -- gross revenue of explosives to other commodities and ratio of carloads to revenue by commodity 1950 - 1953 inclusive.

For example, in 1950, looking at Explosives, you can see while there were only 30,000 cars, Column 2 actually moved, the revenue was 1918.77 per car --

THE COURT: Can the jury hear him without the microphone?

THE WITNESS: I am not accustomed. I have to apologize for using this microphone. I will try to keep my voice up.

In the next column, Carload Traffic Involved, you also note the revenue per car and the comparison with other commodities.

Next you see a ratio of a number of other cars you have to obtain the same revenue. You note the loss in damage sustained in the transportation of these various commodities, showing the loss and damages sustained in ammunition traffic was quite low.

11,508 BY MR. SHEA:

Q. Now, taking that revenue per car, do you want to explain to us in a little more detail just what that shows.

A. Yes, sir. That shows the dollar revenue per unit-car of transportation.

Q. And the revenue on explosives is what?

A. And then on Other Commodities.

Q. I see. Then the revenue on Explosives, just what is that?

A. For example, the year 1950, to the rail carrier on a revenue of explosives, - $1,918.77 per car. For example, on machinery, and machinery parts, the railroad would obtain for hauling a carload of that commodity only $517.14 as an average. This is to point up the terrific amount of revenue that was being obtained on explosives and hauling of explosives and ammunition.

Q. All right. Do you want to turn to your further exhibits?

A. Yes, sir.

Q. Just point out to the jury their significance, so they will see exactly what was put to the railroad.

11,509 A. For example, now on Exhibit 5 --

Q. That is the next page, is it?

A. That is about two pages over.

Q. All right, go ahead.

A. This is a comparison of the Present Rail (Southern Class Rates) Rate, that was in existence at the blanket rate of 65 per cent of the first class, with the proposed rates and earnings that would accrue under docket 28300 or that particular class rate scale, that the loadings of at 50,000 pounds per car and 80,000 pounds per car, and shows your revenue per car-mile and per ton-mile.

For example, the revenue at 65 per cent of first class, at the 50,000 minimum, earnings per car-mile, 274.1 cents.

Q. Now, would you kindly, Colonel, indicate the columns so that the jury can more readily follow it.

A. Yes, sir. For example, this shows the earnings at 65 per cent of the first class rate in existence on a 50,000 pound car.

Over in Column 14, you will note the earnings that would accrue to the carrier at the proposed rate of 40 per cent or column 40, with an 80,000 pound loading, showing that those returns are considerable per car mile.

Q. Well, now, taking that 300-mile run, what is that comparison, at 65 per cent of first class on a minimum of 50,000, the earnings would be what?

11,510 A. 254.15 cents is the rate. The revenue per car would be $822.25. The earnings per car-mile would be 274.1 cents. Ten-mile 109.6 cents.

Q. Do you want to go on?

A. Yes, sir.

Then you see the returns per carrier on revenue per car for the Class 55, at the 50,000 pound log, $562.50, and car-mile 187.5 cents. Earnings per ton-mile 75 cents.

Then we show there the carload - 40 rates or column 40 returned a revenue of $662.40 per car. Earnings per car mile of 220.8 cents.

Earnings per ton-mile of 55.2 cents.

Now, the purpose of this exhibit is to show the high car-mile and per-ton revenues per car that would be obtained at the proposed rate that we suggest.

Q. Do you want to turn to the next page, Colonel? That shows revenue per car at 87,000 pounds?

A. Yes, sir, it does.

Of course, as explained by the General, the higher the weight to the car, the more tonnage placed in the car, the more revenue was produced. This shows the revenue here that would accrue at the class rates proposed at a loading of 87,000 pounds per car. It extends out then to not only revenue per car but the earnings per car mile and earnings per ton-mile, again showing these are exceedingly high returns.

11,511 Q. What is the significance of that 80,000 pounds?

A. 87,000 pounds, is that what you have reference to?

Q. 87,000 pounds, on the next page.

A. The 87,000 pound load is about what we had averaged during the year 1954 for our loading of traffic. Some, of course, would be more, and some of course, would be less.

Q. Colonel, just one question, I do not want to interrupt what you were saying, but I wanted to cover it at this point.

The 65 per cent of the class exceptions rate, what is the fact as to whether the actual movements of ammunition and explosives at that time were at that rate or at a point-to-point rate, on point-to-point rates which were considerably lower?

A. The 65 per cent of first class rate was the uniform rate established sometime back. The 65 per cent of first class rate moved very little traffic. We received thousands of so-called Section 22 quotations, all made on a point-to-point basis, A to B, or from Shumaker to some destination, or from Indianapolis Ordnance Depot to destination.

11,512 Certainly even to us, with the idea of carrying the traffic, those rates were considerably below the 65 per cent per class 1 Rate.

Q. Actually at the time of this presentation traffic that was actually moving was moving at rates considerably lower than this 65 per cent of First Class?

A. Yes, sir.

Q. But returning to this exhibit, Colonel, am I correct then that a 65 per cent of First Class on a car that was loading 30,000 pounds would have yielded 822.25 on a 300-mile run, and if it were loaded 87,000 pounds, it would have yielded 720,36?

A. Yes.

Q. Then as you go down, some of the yields would be higher, some a little lower, but by and large the railroad would get roughly as good a yield per car, at the rate proposed, at a loading at 87,000 pounds, as at the 65 per cent rate with a loading of 50,000 pounds?

A. Not quite. A little less. But very high returns, very high returns.

Q. Correct. Well, I said in the general area, the figures are indicated. Now, will you go to your further exhibits and indicate the significance of them and how this presentation to the railroads was done?

11,513 A. What do you have in mind? Do you want me to go through all these exhibits?

Q. Go right through the exhibits. You do not have to duplicate each exhibit. But, if you will take the exhibits and point out to the jury how they demonstrate compensatory character and highly profitable character of the rate you were proposing.

A. Exhibit No. 1, the very first exhibit, of course shows what accidents occurred in transportation of explosives and resulting in fires and explosions, as a matter of record. The risk factor has been considered rather important in the hauling of this type of commodity. You can note from the exhibit, that in the actual safe practices of handling it there had been negligible loss in the handling of this commodity.

Q. Now, would you turn to exhibit --

A. That goes through to exhibit 2, as well.

Q. I was going to ask if you would turn to exhibit eight. Give us the significance of that.

A. Yes, these statistics show what the average return was for car-mile, per car-mile for freight revenue. In other words, you can see that these are not like the ammunition returns that we proposed, but they are very low - 45 per cent, 42 cents, 37 cents -- what the carrier was received as an average, in the hauling of traffic; and how much lower this average was than the compensation he would receive at the rates we proposed.

Q. Could you take these figures and for the jury relate it to other exhibits and show, just point out to the jury on the basis of your exhibit how much more per car-mile, under your proposal, the railroads would have made than the average earnings per car-mile set out on exhibit 8.

A. Well, for example, if the jury will turn to exhibit 5.

Q. Yes.

A. I refer them to column 13 and column 14 which are the revenues at the proposed rate of column 40, on an 80,000 pound car, not 87,000 but 80,000 pounds.

You will note that the earnings per car mile shown in column 14 are $2.20 or 220.8 cents per car mile.

Returning now to exhibit 8, note the revenue per car mile for the Southern District was 42 cents on an average per car mile.

Q. So that your chart demonstrated that the return on your proposed rate for ammunition would run roughly five times as much as the average returns of the railroad?

A. At our proposed rate, roughly; yes, sir.

Q. Roughly?

A. Correct.

11,515 Q. Well, is there anything further, that you think might be helpful to the jury on the basis of an analysis of your exhibits here?

What about exhibit 12? Would that be helpful to the jury? Would that be helpful in appreciation of your presentation?

A. Yes, I know we relied rather heavily on this because this shows what the out-of-pocket costs are and the fully distributed costs. These are the Commission figures, actually, to the carrier for transporting various commodities.

Unfortunately, what you have given me is partially cut here and I can not identify each of these commodities.

* * *

11,516 MR. SHEA: If the Court please, with Mr. Wright's consent, we are substituting a new copy which appears to be defendant's exhibit 233, defendant 2 AWR exhibit 233.

(Original "Statement on Behalf of Department of Defense Presented by Colonel Flanagan" marked Defendant AWR exhibit 233 is withdrawn and a completed copy marked for identification AWR exhibit 233.)

BY MR. SHEA:

Q. Apparently you have forgotten my question. May I state it again?

A. Yes.

Q. I asked you to refer to exhibit 12 and point out to the jury the significance of that.

A. Yes, this exhibit portrays a comparison of explosives, with other commodities and shows the dollar contribution, shows the ratio of revenue to out-of-pocket costs, and the ratio to revenue -- the fully-distributed cost, all of the cost of carriers involved in transporting freight by rail, and shows the revenue per car.

11,517 Again your average-out-of-pocket cost per car, your average fully distributed cost per car, your average rate, and the average out-of-pocket cost per cent (cents) for distributing.

It should be noted that the ratio of explosives in all instances is very, very high, from this exhibit. The return revenue cost ratio to out of pocket cost is 669 per cent and the ratio of revenue to fully distributed cost is 419 per cent.

In other words, the hauling of this traffic at the rate levels shows an exceedingly, exceedingly high return, and higher than other commodities that you might expect to return a lot less.

Q. Now, Colonel, does your recollection accord with that of General Lasher, that this presentation was made to each of the rate associations for the three associations?

A. It was made to each of the three associations. The format changed. Basically speaking, It was the same.

Q. You were present at each of these presentations, I take it.

A. I was.

11,518 Q. And participated in the presentation?

A. I did.

Q. Does your recollection accord with that of General Lasher that it was indicated to the railroads that if they wanted to participate in the movement of ammunition and explosives for the army that an adjustment of this kind would be necessary?

A. We did. We pointed out to the rail carriers something which I think they were aware of, that their proportion of the traffic that they had hauled had been steadily declining. We attributed this to the fact they had not adjusted their rates.

Q. Was it also indicated to them, as you recall, that you were prepared to go to the Commission with this if an appropriate rate could not be negotiated?

A. I do not recall whether that was stated at the rate-making committee hearings, or not. I knew that that was generally understood by the carriers.

Q. Well, the following these presentations will you tell us what happened, as you recall it.

A. Can you be more specific?

Q. Was there any immediate response from the East?

A. No, there was not an immediate response.

Q. And when was there a response and what was it?

A. The response from the Eastern Carriers, as I recall -- this was 11,519 presented in the springtime now -- and the response occurred in the fall of 1955, where the Eastern or official carriers established the rates mentioned here of 45 on 40,000 and 80 per cent of 45 on the balance of the ammunition of carloading above the 40,000 pounds.

Q. Did you consider that a negotiated rate?

A. I did and my superiors stated that I could accept it as a negotiated rate.

Q. And when you speak of a negotiated rate, do I understand that to mean one that was reached by agreement between the Defense Department and the Railroads?

A. Yes, that they had met the basis that we requested.

Q. Would your testimony accord with that of General Lasher's that in the significant area you did not get quite as much, but for all practical purposes the rate was what you were after?

A. We were not interested too much in the small loading cars, as the General explained.

We loaded heavy. We could load heavier. We were interested in a big mass movement, a heavy loading car. We felt that this was responsive -- and I recommended to my superiors up to the Department of Defense level to accept it on a negotiated basis, and it was so accepted.

I was instructed I could accept it that way.

Q. Is your recollection that the response at that time was not uniform so far as the West and the South and the East are concerned? The West did not offer that same rate at the same time?

11,520 A. Oh, no, sir. The only action that we got out of the immediate -- not immediate -- but for sometime -- was the Eastern reaction, where the rates of 45 at 40 and 80 per cent of the excess over 50 instead of 45 were given to us by the Eastern carriers.

Q. Do you remember what the West did at that time?

A. The best I can recall -- I may be wrong -- I think the West elected to give us 55 per cent on 50,000 pounds. I may be wrong on the minimum. I cannot remember the precise figure.

Q. Do you remember what the South did at that point?

A. As I recall, the South felt there was no need -- at least they did not make any adjustment.

Q. Well, did you keep in contact with the West and South?

A. Yes.

Q. And after the East put in this adjustment, what were you then seeking from the East and South -- from the West and South in the way of adjustment?

A. Well, after the Eastern adjustment and after we considered the response to our presentation, we then as the General said, did not say that you could not put in what we proposed or put in something lower or anything else, but that we would accept the Eastern rates.

11,521 I would like to explain that a little bit, because we wanted some type of uniformity on this thing if we could have it. This is particularly necessary in connection with transit shipments, where you move a shipment

in and you pay the inbound movement from A to B -- the shipments there stands and stays in storage. Then it moves from B to C.

Well, now, on transit privilege it is fixed -- your shipment never stopped. Your rate from A to C applies. For example, the rate A to C could be $1.00 a hundred. The rate A,-B or B-C, could be $1.50. A could be 50 cents, new shipment, A to C $1, $1.50 vs $1.00.

If you are going to figure all sorts of different levels and scales on this thing, it is some sort of a nightmare to a man who is to evaluate the routing and he is torn with a rate scale which makes it much more difficult - much more complex.

Q. Well, now, Colonel, did you keep after the West and the South following the adjustment in the East?

A. At every opportunity.

Q. Do you recall diversions of traffic that would normally have gone through or been routed through southern ports, and over Southern lines, to northern ports and over northern lines?

11,522 A. I remember fairly well the shipment the General mentioned, the huge retrograde shipment, that would have normally moved through Sunny Point, our own facility. But, in order to save the government money and take advantage of the lowest cost, it was moved through the Eastern Seaboard, through our Navy facility into final destination.

Q. Well, would it be fair to say that it became quite evident as time went on, then, that to be competitive with the Eastern lines, and competitive -- I say would it be fair to say as time went on, after the adjustment in the East, that to be competitive with the Eastern lines as well as with the truckers, the South had to make further adjustment --

MR. WRIGHT: I object to the form of the question.

THE COURT: Doesn't that call for a conclusion of the witness?

The witness can state what the facts are. I think you ought to reframe the question.

MR. WRIGHT: My objection is that Mr. Shea is providing what would normally be provided by the witness as to the form of the answer.

THE COURT: I understand.

BY MR. SHEA:

Q. Well, Colonel, were adjustments subsequently made in the West?

11,523 A. Yes, they were.

Q. Do you remember about what time that was?

A. I think springtime of 1956. April, perhaps.

Q. And do you remember what area that covered? Did it cover all of the Western lines?

A. No, it did not cover the entire area. The Western adjustment, while it covered a portion, did not cover the area named Mountain Pacific Territory, roughly that west of the Mountains. There was none made on the basis of that that we considered responsive.

Q. Can you recall an adjustment later being made in the south?

A. Yes, I do.

Q. About when, do you recall?

A. Spring, 1956, I believe, again possibly April or March.

* * *

11,525 Q. Colonel, did you accept the Western and the Southern adjustments as negotiated rates?

A. Yes, sir, for the portion where the adjustment was made.

Q. Now, Colonel, after these adjustments were made were you called upon on various occasions to respond to inquiries from Congressmen about these adjusted rates?

A. I was not contacted by a congressman.

Q. Were you called on to respond to the technical staff on this?

A. Yes, sir.

* * *

11,528 Q. Colonel, just before the luncheon recess I was asking you as to whether questions had been raised on the Hill about this adjustment of rates. Were questions raised and were you called on to respond to inquiries about this rate?

A. Yes, after the rate adjustment was made, I was called on to furnish considerable data and information, primarily to the department of defense level.

Q. Did you actually appear on the Hill in discussion with technical staffs about it?

A. I would not know as I term it the Hill, but I in company with representatives from the army, navy and Marine Corps, Navy and Defense Corps, did appear before the Subcommittee on Preparedness. The discussion was concerning the rate level that had been established.

Q. In more detail what was that discussion?

MR. WRIGHT: If the Court please, I assume this was discussion wholly outside any representative of the Plaintiff --

11,529 THE COURT: Let us find out.

Were any representatives of the plaintiff or defendants there?

MR. WRIGHT: I do not understand the theory on which this is supposed to be admissible.

THE COURT: Of course, what somebody said on the Hill, there would be no opportunity to cross examine.

MR. WRIGHT: Well, your Honor --

THE COURT: Wait just a moment. Is that as far as you want to go?

MR. SHEA: Let me put this question: Was it indicated that these discussions came about as a result of truckers approaching members of the Congress?

THE WITNESS: I would say yes.

BY MR. SHEA:

Q. Will you tell us in some detail about that?

MR. WRIGHT: Well, your Honor --

THE COURT: To go into detail, now isn't that sufficient? Some truckers complained to members of Congress about this rate cut or rate reduction.

MR. SHEA: Your Honor --

THE COURT: A little lower now.

MR. SHEA: At the instigation of the truckers, pressure was being put on them to raise these rates again. This I want to show.

THE COURT: Did they get any response?

11,530 MR. WRIGHT: He would have to connect this with Riss & Company in some way.

THE COURT: Wait just a minute.

MR. SHEA: Your Honor, Mr. Wright, if I understand correctly, is now taking the position that this was a conspiracy of the railroad industry

against the trucking industry, a conspiracy to monopolize the movement of Government ammunition and explosives.

THE COURT: What will the answer say?

MR. SHEA: Just what he said on deposition, that after the rate was put in at the instigation of truckers, a lot of pressure was put on them from the Hill to put back the old rates.

THE COURT: We would have to know what was said on the Hill, how it came about, what certain Congressmen did, so that he could be called in for cross examination.

MR. SHEA: I am asking him to state that.

THE COURT: Have you already asked him that truckers complained on the Hill?

The jury can draw their own conclusions that they complained about the rate reduction. You know, I do not think it is necessary to press it at this point.

BY MR. SHEA:

Q. Will you mark this for identification?

DEPUTY CLERK: No. 7 defendant, the ACL exhibit 501 for identification.

11,531

(No. 7 Defendant ACL exhibit 501 being verified statement of Lt. Colonel Flanagan "Increased Rates 1956" marked for identification.)

BY MR. SHEA:

Q. Colonel, I show you exhibit ACL 501 for identification and ask you to look at that and see if you can identify it for me.

A. This appears to be the statement I made before the --

Q. What was Ex Parte 206?

A. That was a general rate increase by the rail carriers before the ICC.

Q. And did Mr. Bill Burns, as he has been referred to in this proceeding here-tofore, did he intervene on behalf of Munitions Carriers Conference?

A. He did, and presented a statement at the Kansas City hearings. This statement is in reply to --

MR. WRIGHT: I did not hear that last. Presented what?

THE COURT: Do you remember your last answer?

THE WITNESS: Yes, I think I can finish it up. Yes. He did appear at the Kansas City hearings and presented a statement there. This is in reply to his statement at the Kansas City hearings.

BY MR. SHEA:

Q. What is the Munitions Carriers Conference?

11,532 A. To the best of my knowledge, it was a conference of approximately some 70, 76 motor carriers that did a considerable amount of business or had an interest in handling or hauling ammunition for government traffic, that type of commodity.

Q. Were there other appearances on behalf of truckers in that proceeding?

A. I was not at the Kansas City hearings, so I cannot testify to that.

Q. What about the hearings in Washington?

A. There were other truckers appearing there, yes.

Q. What position was Mr. Burns taking in that proceeding, do you recall?

A. To the best of my recollection -- and I am thinking of the statement presented at the Kansas City hearings, he felt that the rate level established on the ammunition traffic --

Q. You are talking about the rate adjustment we have been talking about?

A. Right, sir.

He felt it was low. The proper level would be 60 per cent, the going first-class rate. He had a considerable history on Section 22 of the ICC in the statement. He indicated in the statement that if the rail carriers were not dissipating their revenues by the type of adjustment they had made, perhaps it would not be necessary to seek this increase or perhaps as much of an increase. He requested the Commission to admonish us -- now I am speaking of the military when I say "us" -- for seeking such a low rate level.

11,533 Q. Do you recall if he took the position or do you recall whether or not he took the position the ICC could instruct you to take that position?

A. He stated the ICC could take cognizance. He quoted cases.

MR. WRIGHT: I think we should have what Mr. Burns said.

THE WITNESS: To the best of my recollection.

THE COURT: What did he say to the best of your recollection?

THE WITNESS: He asked the Commission to admonish us, stated the rates were unduly low, stated 60 per cent of the first class rate would be proper and the other points I have outlined.

MR. SHEA: If Your Honor please --

THE COURT: One at a time.

MR. WRIGHT: I believe there was a written statement.

THE COURT: Let us find out. Was there a written statement?

THE WITNESS: Yes, sir.

11,534 MR. WRIGHT: It is not the best evidence, from this witness. If it is important here, what Mr. Burns said, if it is in a written statement I think we should have that statement.

THE COURT: Do you have a written statement?

MR. SHEA: If the witness knows the position Mr. Burns took --

THE COURT: Now, Mr. Wright, if you are not satisfied with the witness' answer and you have the written statement, you can cross examine.

MR. SHEA: Certainly.

MR. WRIGHT: I think we should not have to rely on Colonel Flanagan's recollection or interpretation of the statement. The statement is readily available. It could be handed to him.

THE COURT: I will let him testify and will let you cross examine on the accuracy of his testimony.

BY MR. SHEA:

Q. Now, Colonel, I think you testified that this statement of yours was in response to the position taken by Mr. Burns, is that correct?

A. Yes.

Q. Would you be able to recall the detailed figures and exhibits in that statement?

A. Just very roughly. This is back some time.

11,535 Q. You could not recall it in detail?

A. Not in detail. Roughly I could recall it.

Q. Do you recall if you verified its accuracy at the time?

A. This was a considerable effort, made by many people, by myself, to show the military --

MR. SHEA: I offer this.

THE COURT: This is in response to the Colonel?

MR. SHEA: Right.

MR. WRIGHT: There is not any reason to receive this. This is a statement of Colonel Flanagan in response to a written statement made by Mr. Burns which has not been offered here in a proceeding to which Riss & Company was not a party, in which the munitions carriers Conference was not representing Riss & Company. Riss & Company had withdrawn from the Conference at the time this proceeding occurred and this position was taken by Mr. Burns, over this precise issue.

There is not the slightest occasion for offering in evidence here the statements as to what Mr. or Colonel Flanagan had to say to Mr. Burns and vice versa, in that proceeding, to which Riss was not a party and there was no one representing Riss & Company's interest.

MR. BALL: May I approach?

THE COURT: Surely.

11,536 (at the bench.)

THE COURT: Let us find out the problem here.

MR. BALL: In the first place, let me call attention to the Court that Mr. Wright is making a speech, making statements of facts, following the admonishment this morning the Court would not listen to this. This has been in front of the jury. I thought you wanted to know the problem this morning when I stated my objection.

THE COURT: When I want to hear an objection, I will hear it.

MR. BALL: There is one mis-statement I want to correct, that Riss & Company was not a member of the Munitions Carriers Conference. Riss was paying dues in that at the time.

MR. WRIGHT: Mr. Ball is 100 per cent wrong.

THE COURT: Wait a minute now. I will hear you.

MR. SHEA: Your Honor, so far as the technicals of evidence are concerned, I have laid appropriate foundation for the court. That is No. 1.

No. 2, so far as its relevance is concerned --

MR. AILES: If this question is going to be argued, a lot would like to hear it.

THE COURT: Let us excuse the jury and argue it out of the presence of the jury.

11,537 (In open court.)

THE COURT: The jury will be excused for a few minutes.

(The jury left the courtroom and the following occurred out of their presence.)

THE COURT: All right, now. what does this answer propose to say?

MR. SHEA: Let me state the position: In the first place, there is a technical matter, I have now established the technical matter of his past recollection of the record. The only question now is as to relevancy.

THE COURT: I will hear you on that.

MR. SHEA: The relevancy it seems to me is wholly clear. Mr. Wright can not, as he chooses, on one day take the position that this is a conspiracy of all of the railroads to secure a monopoly of the movement of ammunition and explosives from all of the truckers, and the next day take the position that the only thing that is relevant is whether or not Riss was present.

Now, in this proceeding -- and I believe it to be the case but I do not want to argue about this because I do not think it is necessary, I believe it

to be the case that Riss & Company was a member of the Munitions Carriers' Conference and the statement was presented on behalf of the members of the Munitions Carriers Conference.

11,538 But in any event, certainly the truckers were in there protesting this rate and the truckers were taking the position that the ICC had authority and jurisdiction over the Section 22 quotations, had jurisdiction to require that the adjusted rate be increased to 60 per cent of the first class rate.

It is perfectly clear -- I would have developed had I been permitted earlier -- I would have developed that there was constant pressure from the Congress to get this up. Then they sought to get the ICC to get it up.

Now, your Honor has admitted Plaintiff's offers of proceedings before the Interstate Commerce Commission and what ICC examiners had to say; the proceedings in the War Materiels Reparations Cases, what happened befor the PUCO, in short, the activities of the railroads before public bodies, and so on.

This position which was taken by Colonel Flanagan, it seems to me, is admissible in the first place to show that the same kind of activities were going on on behalf of the truckers. This is one.'

The second point of relevancy is that at that time, shortly after the rate cuts, this clearly establishes a variety of relevant things:

It establishes that the motor carriers were competing on a basis of tariffs or ammunition and explosives, quite under the 40 per cent rate -- 40-36 per cent rate. That is another relevancy.

The exhibit establishes further that not only did competition continue between the truckers and the rails in respect to this, but that the truckers were attempting, through the Interstate Commerce Commission to deprive the rails of their inherent advantages, under the Interstate Commerce Act and its declaration of national policy.

11,539 Clearly this is relevant.

THE COURT: As I understand, this is Colonel Flanagan's reply to a statement made by Mr. Burns.

MR. SHEA: Right.

THE COURT: The truckers were complaining about this alleged rate reduction and they could not compete against that rate, apparently. That was one of their arguments.

MR. SHEA: Yes.

THE COURT: This applied to a great number of truckers.

MR. SHEA: Yes. It applies to the over-all problem.

THE COURT: Now, what I stated on page one of the opinion which I filed on Monday, denying directed motions -- I said, "Plaintiffs' contention as set forth on page one of its memorandum summarizing Plaintiff's Conspiracy Proof against all Defendants conspired to monopolize the transportation of ammunition and explosives for the United State Government in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C.A. Sections 1,2) by means which, if considered by themselves, are entirely lawful. Plaintiff claims that the purpose of this unlawful conspiracy was to obtain for the railroads, as a whole, at least 90 per cent of the government munitions traffic, without regard to the merits of any particular railroad or group of railroads as competitors for such traffic."

11,540 I understand your contention, Mr. Wright, to be that the railroads wanted to monopolize this ammunition traffic not only as concerning Riss but other truckers. This was not only a campaign against Riss but other truckers, correct?

MR. WRIGHT: That is right, Your Honor.

THE COURT: Why is it not admissible, then? I will hear you on that.

MR. WRIGHT: The reason it is not admissible is that it does create here, something not in this case, what, if anything could the ICC do about this cut of the Munitions Carriers Conference after it occurred?

Riss & Company's position was always quite clear, that the ICC could do nothing. It had been consistently advised to that effect and they opposed all efforts by the Munitions Carriers Conference to go to the Commission and try to get relief from the Commission upon the ground that in the view of its lawyers there was no relief the Commission could give that would be of the slightest value to Riss & Company or any other trucker.

11,541 Now, it is true that Mr. Burns was of a different view, and he evidently thought that the Interstate Commerce Commission might pay some attention to him and these other munitions carriers who were also being hurt -- Riss was not alone, and your Honor pointed that out, it was not the only one who suffered an adverse impact -- and did make a presentation before the Commission in Ex Parte 206, which, in the judgment of Mr. Burns was one which he thought might lead the Commission to condition the increase, the rater general increase the railroads were seeking upon some action which would relieve the situation as to the truckers on the withdrawal part, make more shallow the Depth of the cut that had been put into effect, that the truckers were complaining about.

It is perfectly clear now that what you have here is Colonel Flanagan's testimony in response -- he appeared on behalf of the Department of Defense and the defendant, of course, the action of the Department of the Army in seeking the cut, as he had a perfect right to do.

Now, whatever Colonel Flanagan was able to present there, much of it is perfectly admissible here.

11,542 If Mr. Shea wishes to undertake to show by Colonel Flanagan that actually this rate cut did not have the devastating impact on the trucking industry that Mr. Burns claimed it did, or that we claim it did, he is perfectly able to do that by eliciting from Colonel Flanagan whatever facts that are contained in this statement that tend to show that fact.

I do not have the slightest objection to that. What I am objecting to is to simply having incorporated in the record here a statement by Colonel Flanagan, and figures which were addressed to an entirely different issue before the Interstate Commerce Commission.

There were really two different issues: (1) Could the Interstate Commerce Commission -- did it have power to do -- what Mr. Burns was asking it to do. Or, should it, if it did have power?

Now, neither one of those issues - as I understand it -- is in this case.

What we are determining here, I believe, is whether or not this rate cut was made pursuant to this pre-existing conspiracy. Now, what if anything Mr. Burns said on behalf of the Munitions Carriers Conference to the ICC, with respect to what he wanted the Commission to do in 1956, and what Colonel Flanagan's response was to the Commission, seems to me is quite immaterial to the determination of the issue we are faced with her. I would agree there are many facts in this statement which may be relevant, and there may be many facts and, obviously facts in Mr. Burns' statement which are relevant to the issues to be tried here.

11,543 I say the proper way to introduce them here in so far as Mr. Burns is concerned is through him, where he can be examined on the basis of what he is claiming.

As far as Colonel Flanagan is concerned, that is through his testimony, and he may be cross examined on those facts.

THE COURT: Who has the statement of Mr. Burns?

MR. WRIGHT: We do not have the statement here. It did not occur to us that there would be an attempt made here to litigate the issues contained in 206. I have sent to the Office for them.

THE COURT: Just a minute. I have not had the opportunity and I cannot just glance through these 12 or 13 or 14 pages in a minute.

There is no reason why you cannot continue on to some other point.

MR. SHEA: Your Honor, I expect to finish up very promptly. Why don't we take a brief adjournment while you are looking at it?

11,544 THE COURT: I would like to read the statement of Mr. Burns, too.

MR. SHEA: I can provide you with an opportunity.

THE COURT: And give you the chance to file a short memorandum, if you wish to.

MR. WRIGHT: That is a further objection.

In no event could this response be received without receiving the statement to which it is a response just as a simple matter of making sense out of it.

THE COURT: This is just one side. I would have to read the so-called statement of Mr. Burns, what he said and what the Colonel stated in reply thereto. That is not in evidence yet, the statement, is it?

MR. SHEA: No, you ruled that Mr. Wright could put that in if he wanted, to cross examine on it, if he wanted, as he is entitled to.

Now, Your Honor, let me say this, I do not see why we cannot take the opportunity for you to read just the few pages -- you will not want to go

into the exhibit, but Your Honor, Mr. Wright is not meeting the issue. No. 1, I have laid the basis for the technical admission of this: No. 2, I have stated its relevance on two or three grounds and I will state another ground.

That is, that this kind of position which they are taking here now they took on the Hill, before the ICC, and so on.

11,545 This is relevant as to what the reaction to that was. Now, Your Honor has allowed what seemed to me to be the widest kind of latitude to the plaintiff in putting in War Reparations cases --

THE COURT: Yes, that is true, I have.

MR. SHEA: What I am presenting here is certainly highly relevant to the issues in this case.

THE COURT: That is true.

You see, Mr. Shea, I cannot get the complete picture unless I first read what Mr. Burns said. That ought to be -- at least what he said, what he said should be in evidence before the jury, if I admit it, to show what Colonel Flanagan said in reply to that.

You can't just take this answer. If I admit it, the jury will say "What is this in answer to? What did the other party say that required this answer?"

MR. SHEA: The Colonel said what I said. Mr. Wright, if he feels it is important, can put the rest of it in and can cross examine on it. I mean I should not be required to try my case on the basis of how Mr. Wright would like to see it tried.

THE COURT: I will hear Mr. McGlothlin.

MR. McGLOTHLIN: Your Honor, I want to refer to what seems to be a parallel situation over the strenuous objections I made. Your Honor

admitted an authenticated statement as I regard it, of what appeared to be a state policy, to some legislature.

11,546 Now, we have here a statement by a Department of Defense representative with the very representative who wrote it on the stand, which we did not have last time. This, furthermore, is a sworn statement. This is not just a brief.

Now, with respect to the admission of Mr. Burns' statement: The parallel there is, your Honor did not require the Plaintiff to offer in evidence as part of its case the statements of the Brotherhoods or other proponents of the 5,000 pound bills. You admitted simply the opposition of the Federal Government to those bills.

Now, it seems to me that is a precise parallel to the offer on behalf of the Defense of the Government's statement with respect to this matter.

Certainly we had wanted to, or still want to -- we can offer the statements of the Brotherhoods to which the Defense Department was addressing itself. Similarly, Mr. Wright, if he wishes to adopt Mr. Burns' statement with respect to the Munitions Carriers Conference, he is entitled to.

But, Your Honor, we should not be put in the position of being required to vouch, by over-information, a statement of a bitter opponent of the railroads on this very matter. I see no difference between the two situations.

11,547 THE COURT: Just a minute. What about if I admit this -- and I will not admit it until I read it first -- I will read it if it takes 30 minutes, and make up my mind whether it is admissible. He certainly could lay the foundation for the admissibility of Mr. Burns' statement by cross examining this witness.

MR. McGLOTHLIN: I have no quarrel with that.

THE COURT: As to whether or not this is in reply to statements made by Mr. Burns.

Now, gentlemen, just a minute. You see, Mr. Wright, you are coming to one of the most important issues in the case, the so-called rate reduction. The jury has got to find out some time, if this case gets to the jury, what the intent of the railroads was at the time they made these reductions: Did they make the reduction for the purpose of meeting the competition of the truckers, or did they make it for the purpose of eliminating the purpose of the truckers?

If they made it for the purpose of eliminating the truckers under the Acme case, they can't do it at this point at least.

It seems to me all of this evidence introduced through General Lasher and Colonel Flanagan is important on the question of intent and motive. Why did the railroads do what they did in October of 1955, and March, 1956, and in April, 1956, regarding the three rate reductions. Did they do it for the purpose of driving Riss out of the business or was the pressure put on them by the Defense Department or the Army?

11,548 And they are, in effect, saying, "If you do not do this, we will go to the ICC and do certain things."

Now, that seems to be an issue which goes to the intent. The jury may believe, after they hear all of the evidence, they might conclude, "Well, the railroads would not reduce their rates during the reparations hearings, they waited for the psychological moment and used this as an excuse to reduce the rates.

They figured probably that they had to have some reason to reduce their rates, so if they were ever caught or called upon, they could always say the Army put the pressure on us.

The other side will argue that is not so.

You have a sharp issue of fact here. I do not know what the jury will say. I think they are entitled to all of the evidence and information they can get to arrive at this very point. That is my feeling about the matter. I have always felt that way. I think I have given both sides a lot of latitude, as I said, the Plaintiff might be able to convince the jury that surely the railroads, the pressure was being put on them by the army. You might argue you do feel, when they fought back in the Reparations cases and beat it and won it, involving a billion dollars -- you believed they were so frightened of the Government or Army, but do you believe they would have given in that easily?

11,549 These are issues to be argued before the jury.

Now, query: This does not involve only Riss & Company. This involves other truckers. This is a campaign, so the plaintiff says, to drive the truckers out of that kind of business or away from that kind of business. I want the jury to have the benefit of all of the evidence admissible in this case, whether it hurts the plaintiff or hurts them or what, or whether it hurts the railroad. I will take fifteen or twenty minutes out to read this statement.

Now, you understand my position, Mr. Wright?

MR. WRIGHT: I am willing to withdraw the objection to the statement provided it is offered with the statement to which it purports to be a reply. If you read it, you will see that there is constant reference to such things as Sheet 5 of Mr. Burns' statement on sheet 2, and matters of that kind, which make this statement I say unintelligible on its face.

THE COURT: I am inclined to believe you or agree with you without having read it. But, however, if counsel wishes to protect the record and not offer the statement of Mr. Burns, then I will have to make a ruling whether this can be considered by itself or not.

11,550 MR. SHEA: If Mr. Wright wants to put it in, he is welcome to it.

MR. WRIGHT: Let us see what we are doing here. Now, we already have in evidence a rather elaborate presentation, a great deal of figures, some of which Colonel Flanagan prepared and some which somebody else prepared, on which he will be subject to cross examination.

Now, what is being offered here is a whole new set of tabulations, fifteen or twenty pages of them, again which I suppose, if they go in would be a subject of cross-examination and in terms of economy and time, it would seem to me that if there are figures in this statement, or these tabulations here, which are thought by the defendants to have relevance and materiality to this case, that he would normally direct his attention to them and put them in evidence and have the cross examination on that.

What is apparently being proposed here is just to dump in the statement in its entirety which was prepared for a different purpose, and has right on its face a great deal of material which would not be relevant here.

11,551 THE COURT: Doesn't this relate to rate reduction?

MR. SHEA: Yes, indeed.

MR. WRIGHT: It all relates to that subject, but it was prepared for quite a different purpose than any testimony that is being offered by Colonel Flanagan in this case.

I think that much is clear right on its face. That is not directed to the issue we are trying here.

MR. SHEA: Your Honor, if Mr. Wright wants to put in the statement of Mr. Burns, which I will hand your Honor, he can put it in. I will hand it to him. He can put it in now.

THE COURT: Suppose you do that. You put the statement in of Mr. Burns before the jury has the benefit of hearing any statement. You put it in on cross examination, offer that statement, and then you offer the statement of Mr. Flanagan.

MR. SHEA: It is all right with me.

THE COURT: Is that agreeable?

MR. WRIGHT: Yes, we can do it that way.

THE COURT: Then, I will not have to bother reading it.

MR. WRIGHT: If we can have a copy to use to put in. We do not have one here, ourselves.

THE COURT: Yes, Well, this is my copy --

11,552 MR. WRIGHT: This is to be marked our next exhibit number.

THE COURT: It should be Plaintiff's exhibit.

MR. McGLOTHLIN: Is this the Burns' statement which is to be marked?

THE COURT: That is what I understand.

MR. McGLOTHLIN: I object to the statement of Mr. Burns being offered for the truth of the matters asserted. If it is being offered merely as identification, or this is what he said.

THE COURT: This is what he said.

MR. McGLOTHLIN: It can not be used here after this argument or briefing as truth of the matter. That is a difference.

THE COURT: In other words, your position is that if it is offered for the truth of what is in that statement, he must be here to be cross examined?

MR. McGLOTHLIN: Exactly.

THE COURT: That is your argument in respect to any other document.

MR. McGLOTHLIN: Colonel Flanagan is on the stand.

MR. WRIGHT: He has undertaken to say what Mr. Burns said. This is the best evidence of what Mr. Burns said.

11,553 THE COURT: You are not offering that for the truth of what he said?

MR. WRIGHT: No, this is the evidence as to what Mr. Burns has said.

MR. SHEA: And is not being offered for the truth of what he said.

THE COURT: We understand that. I think that is a better way to approach the problem.

DEPUTY CLERK: Plaintiff's exhibit 286 for identification.

(Statement of Mr. William J. Burns dated November 27, 1956 on Munitions Carriers Conference, Inc., addressed to "All Members of the Munitions Carriers Conference" is marked Plaintiff's exhibit 286 for identification.)

MR. WRIGHT: I gather you will be asked to identify that as a copy of Mr. Burns' statement. Maybe you had better look at it.

THE WITNESS: Thank you very kindly, sir.

THE COURT: Are we in agreement now? Are we going to proceed? All right.

(The jury resumed their places in the courtroom at 2:30 p.m. and the trial resumed.)

MR. SHEA: That has now been received in evidence?

THE COURT: Providing the other one also has been received, offered by the plaintiff, the Burns' statement should be read, if they are going

to be read to the jury first, and then the reply afterwards.

11,554 MR. SHEA: He can ready anything he wants.

THE COURT: All right.

MR. SHEA: Do I proceed now?

THE COURT: You make your offer.

MR. SHEA: I make the offer of the verified reply statement of Lt. Colonel Flanagan in Ex Parte 206.

THE COURT: And Mr. Wright is offering this in evidence?

MR. WRIGHT: On the understanding that there will be admitted in evidence what has been marked here as Plaintiff's Exhibit 286 for identification which Colonel Flanagan has been asked to decide whether that is or is not the statement of Mr. Burns to which he was replying to this exhibit Mr. Shea has in his hand.

THE COURT: Ladies and gentlemen of the jury --

MR. McGLOTHLIN: Your Honor, I want to make clear my point: I understand the document your Honor has in his hand will be admitted for the limited purpose we discussed outside of the presence of the jury.

THE COURT: Yes. I will try to explain that to the jury.

Mr. Wright has offered in evidence a document known as Munitions Carriers Conference, Inc., a statement allegedly prepared by Mr. Burns, Munitions Carriers Conference, Inc., known as Plaintiff's exhibit 286, consisting of several pages.

11,555 Now, you will hear this statement read to you, the statement I hold in my hand. Mr. Wright is not offering this statement for the purpose of proving the truth of what Mr. Burns allegedly stated in that statement. He is simply offering it as a statement. Because, if he were offering it for the truth,

Mr. Burns would have to be put on the stand so he could be cross-examined by counsel for the defendant as to the truth of this statement. It is only offered for that purpose.

Also, you will also hear read to you a reply to this statement of Mr. Burns, put in evidence or offered in evidence by Mr. Shea, representing Atlantic Coastline, known as Atlantic Coastline Exhibit 501. That shows the Colonel's reply to the statement of Mr. Burns.

Now, you are offering this as to the truth of the statement?

MR. SHEA: The Colonel is on the stand. He can stand cross-examination.

THE COURT: Let explain this again to you: When a party calls a witness to the stand, like Mr. Shea has called Colonel Flanagan, he says or represents in so many words to the jury, "Now, ladies and gentlemen of the jury, you can accept this as true," though he does not say it, "we have placed General Lasher and Colonel Flanagan on the stand. We vouch for the credibility of the witnesses and want you to believe the witnesses."

11,556 Now, the purpose for cross examination by Mr. Wright or anybody else who wants to cross examine is to try to show you the witness is not telling the truth or exaggerating or some other thing. Now, obviously, you cannot cross examine a document. This document, prepared by Mr. Burns, if it is offered in evidence, Mr. Wright cannot say we vouch for the credibility or truth of that statement. You say "Why?" The reason is that you cannot cross examine a document. Documents cannot answer, we all know that. In order to vouch for the truthfulness of that statement, he would have to put Mr. Burns on the stand and make the same proffer from him. I think it is fair. You have to have a human being on the stand, we will say, to offer him for cross examination and that is for testing the truthfulness of that witness.

Any objection to that?

Maybe I complicated it, I do not know.

MR. SHEA: Mark this, please.

So far as I am concerned, Mr. Flanagan can summarize the statement to which he was responding to my satisfaction. If Mr. Wright wants to read Mr. Burns' statement to the jury --

11,557 THE COURT: Do you want to do that?

MR. WRIGHT: I think it would be most helpful to the jury if Mr. Burns' statement were read first, because there are specific references in Colonel Flanagan's statement.

THE COURT: Suppose you read it first then.

MR. WRIGHT: It would be more intelligible if they were read in order.

BY MR. WRIGHT:

Q. You are satisfied it is the statement that Mr. Burns made?

A. I cannot be sure. It looks to be the same statement, yes.

Q. It is the statement produced by your counsel, Mr. Shea?

A. Mr. Shea is not my counsel.

THE COURT: All right.

MR. LAYNE: Plaintiff's exhibit 286 is on the letterhead of "Munitions Carriers Conference" dated November 27, 1956.

Do you want me to read that?

THE COURT: Proceed.

MR. LAYNE: (Reading)

"Before the Interstate Commerce Commission

"Verified Statement of W. J. Burns, Managing Director,

11,558 Munitions Carriers Conference, Inc., of American Trucking

Associations, Inc., Washington 6, D. C.

"Submitted for the consideration of the Interstate Commerce Commission in Increased Freight Rates Eastern and Western Territories, 1956, Ex Parte 206, Interim Increase Proceeding, Kansas City, Missouri, November 26, 1956.

"Part I.

"My name is William J. Burns. I am Managing Director and Secretary of the Munitions Carriers Conference, Inc., of the American Trucking Associations, Inc., with offices at 1424-16th Street, Northwest, Washington 6, D. C. The Conference is a national organization including in its membership motor carriers transporting more than 80 per cent of the ammunition and explosives shipped by truck for or by the military establishments of the Federal Government. Prior to becoming the first Managing Director of the Conference, I was associated for three years with the Military Traffic Service (now the Office of Transportation and Communications) Office of the Secretary of Defense.

"I am now appearing in this proceeding, on behalf of the members of the Munitions Carriers Conference not in
11,559 opposition to the railroads' petitions for increases in their freight rates and charges, but rather to seek a ruling, a finding or an admonishment from the Commission in its reports and orders to the effect that any increases will be applied uniformly to all Section 22 quotations made by the railroads for

the transportation of Government ammunition and explosives and also on the understanding that the existing and outstanding Section 22 quotations made by the railroads covering this traffic will be restored to at least 60 per cent of first class, or be otherwise adjusted so as to be under the National Transportation Policy and/or those sections of the Interstate Commerce Act which provides for 'due consideration . . to the effect of rates on the movements of traffic by the carrier or carriers for which the rates are prescribed'; and 'to the need in the public interest' of 'adequate and efficient transportation service' . . . ' at the lowest cost consistent with the furnishing of such service; and ' to the need of revenues sufficient to enable such carriers under honest, economical and efficient management, to provide such service .' We hope to prove to the Commission on this record that where on

11, 560 the one hand the railroads require increased rates on traffic moved for commercial shippers, on the other they initiate severely depressed, perhaps even destructive rates, to government agencies under prevailing practices incident to Section 22 of the Interstate Commerce Act, and to introduce evidence and argument that will warrant Commission notice and action.

"Part II

"First, I will produce facts for the record relating to the background and legislative history of Section 22, particularly that part which deals with free or reduced rates to the Government.

"Since a cloud of mystery is generally assumed to surround the 'free or at reduced rates to the government provisions' of the Interstate Commerce Act, I have taken considerable time to study the antecedents of the Act, with particular emphasis on the origin, evaluation and intent of Section 22.

"When Section 22 was included in the Act to regulate Commerce of 1887 -- now the Interstate Commerce Act -- the Congress never envisaged the type of rate-making practices that have come into being thereunder, nor the extent to which these practices might come
11,561 into conflict with cases of the kind that are involved in Ex Parte 206.

"The origin of 'rate concessions to the government' may be traced to the early land grants, other grants-in-aid to the states and by the States to the existing or projected railroads. Some of these early acts and arrangements contained provisions whereby, in exchange for the grants of land and other aid, the carriers were to allow property belonging to the United States of America or persons in its service to be transported free from any toll or charge.

"During the period 1850-1871 the Federal and State Governments both granted large acreages of land to the railroads to aid in railroad construction. They made monetary loans and set up tax privileges and immunities for the struggling carriers. These land donations, commonly known as the 'Land Grant Acts,' continued to promote

rate concessions to the government but were varied as to the magnitude thereof. The acts, for example, contained such phrases as 'free from toll or other charge', "subject to such regulations as Congress may impose restricting the charge for such governmental transportation'; the same shall be
11,562 transported over said road, at the cost, charge and expense of the corporation or company owning or operating the same' and 'free from all cost or charge therefor to the government.'

"The wording, 'free or at reduced rates', which is now contained in section 22, seems to have first appeared in a bill to regulate commerce introduced by Congressman Reagan of Texas in 1877. Reagan's bill passed the House in 1878 but died in the Senate.

"The beginning of the final stage in the evolution of Section 22 arrived in December, 1884 when the House passed Reagan's bill H.R. 5461. About the same time the Senate was considering a similar bill of Senator Cullom of Illinois, and when the Reagan bill came up from the House, the Cullom bill was passed by the Senate as a substitute for it on January 30, 1885. The differences in the two bills basically revolved around the long-and-short-haul provision, and anti-pooling clause and enforcement procedures. It should be noted, however, that differences in wording existed with relation to the transportation of government freight at reduced rates. Since
11,563 the Land Grant Acts had placed reduced rates to the Government on a fait accompli basis, the differences in the two bills

turned on wording which would make the reduced rates to the Government lawful in an act which otherwise was designed to prevent the very thing reduced rates to the government imply -- discrimination.

"The Reagan bill provided 'that nothing herein shall apply to property carried for the United States at lower rates .. and charges than for the general public', while the Cullom bill stated 'that nothing herein shall apply to the carriage, storage or handling of property free or at reduced rates for the United States, state or municipal governments.'

"Early in 1887 a committee of conferees reported a bill which was passed by the Senate on January 14 and by the House on January 21, 1887. This bill, which was a compromise in so far as the free transportation provisions of the Reagan and Cullom bills were concerned, was signed by President Cleveland on February 4, 1887, and became the Act to regulate Commerce. Thus Section 22 was born.

"Section 22, then, was intended only to provide a
11,564 lawful method of extending the rate concessions which had been given to the Government by the land grant railroads for many years prior to the inception of the Interstate Commerce Act, and which was destined to continue through the land grant acts for many years subsequent to the passage of the Act. Section 22 was also intended to provide a means for railroads other than the land grant railroads to meet the competition of those that quoted reduced rates to the Government.

"From 1887 to 1946 the Government moved much of its traffic under the land grant rate concessions, and as has been pointed out by Mr. Earl Smith, Director of Transportation and Communications for the Department of Defense, in his testimony before the House Interstate and Foreign Commerce Subcommittee in connection with hearings on H. R. 6141, 6142 and 525 on April 24, 1956, 'it was not until the repeal of the land grant rate concessions to the military on October 1, 1946 that Section 22 came into full use.'

"With the repeal of the land grant acts in 1946 much of the early government rate concession philosophy was vitiated. The foundation on which Section 22 rested was removed.

11,565 "In the meantime we have had a growth in our military establishment from 27,791 men we had in the army in 1887, to the three million we have in our armed forces today. Four or more wars have occurred in the meantime in which vast amounts of Government freight and vast numbers of personnel have been moved on Section 22 quotations.

"Additionally, new and competing forms of transportation have evolved -- motor carriers, water carriers, freight forwarders, air carriers, bus lines, the postal system -- all of which are now competing with the railroads for the Government traffic load.

"The munitions carriers compete for the haul of Government ammunition and explosives.

"Section 22 and its counterparts in Parts II and III of the Act are now invoked to implement this competition.

"And the rate quotations that are made thereunder are uncontrolled. So far as my research shows, there was never contemplated a situation where the Government as the largest single shipper in the United States could without reference to land grants, receive and encourage lower rates than are available to commercial shippers as a matter of habitual practice.

11,566 It was never envisaged that Section 22 should be used as a cover for destructive rate making practices and yet, as we shall show, this is generally what is happening. (A more detailed analysis of my study, which was part of my testimony before the House Interstate and Foreign Commerce Subcommittee on H.R. 525, June 7, 1956, is attached as Appendix A.)

"History of Motor Carriers of Munitions.

"The movement of explosives by truck is not new. As early as 1911 a truckload was moved for one of the commercial powder companies -- a company which moves approximately 80 per cent of its tonnage via this method today. Following passage of the Motor Carrier Act of 1935, interstate shipments of ammunition and explosives increased, but not until World War II did this tonnage move in volume. The military establishments were quick to recognize practicalities of this method of transportation during the war, and during the post-war period encouraged wider utilization of trucks to transport munitions.

"During the Korean War larger tonnages were shipped by truck than in any of the preceding years, including those of World War II. And it is rate on military ammunition and explosives under Section 22 was approximately 65 per cent
11,567 of the first class rate -- 65 per cent being the rate the Commission had found not shown to have been unjust or unreasonable in the War Materiels Reparations Cases, 294 I.C.C. 144. Then in October, 1955 the Official Territory railroads slashed, through the medium of Section 22, the generally accepted 65 per cent rate level to approximately 40 per cent of first class on a volume minimum carload weight of 90,000 pounds.

"At this time there appeared to be differences in railroad thinking, since the Western railroads reduced their rates to only 55 per cent of first class, while the Southern railroads did not reduce their rates at all. These reductions were in effect for less than two months when the railroads petitioned the Commission for an immediate 7 per cent across-the-board increase on practically all commodities in Ex Parte 196.

"The rate level today, on military ammunition and explosives, as established by the railroads through the medium of Section 22, is generally 40 per cent of first class on a volume minimum carload weight of 90,000 pounds with minor exceptions in Mountain Pacific-Pacific Coast territory and Transcontinental territory. The rates in the former significant to note that, while several billion pounds of munitions have been
11,568 moved by truck for the military since the end of World War II, there have been no fatalities attributed to an explosion in any of these highway vehicles.

"The ability of the trucking industry to safely transport ammunitions and explosives was attested to by the Commission in MC 200 (sub 84) when it was stated by the Examiner and later affirmed by the Commission, 'that the transportation of dangerous explosives over the present highway system by properly qualified motor carriers under the Commission's Safety Regulations is not a particularly dangerous service; that the motor carrier safety record in the transportation of dangerous explosives is generally satisfactory; that the transportation of dangerous explosives by motor vehicle, relatively speaking, provides no greater hazard to the public than the transportation of such commodities by rail.'

Part III.

"A. History of Rail Section 22 Rate Reductions on Military Ammunition and Explosives.

"From the period of World War II to October of 1955 the generally quoted and accepted being based on a distance
11,569 scale which approximates a 55 per cent level and the rate in the latter also on a 55 per cent level with the exception of transcontinental traffic into and out of Southern territory where the rate remains at the 65 per cent level.

"B. Why were the Rail Rates Reduced on Government Shipments of Munitions?

"This is a question concerning which I can present no conclusive factual answer but in my position as managing director of the Munitions Carriers Conference, I have been so close to the situation as it has developed both in the Department of

of Defense, on Capitol and among the motor carriers belonging to the Munitions Carriers Conference, that I can express some valid opinions on this subject for the Commission's consideration.

"In the first place, it is to be noted there was no reduction in the general level of section 22 quotations on ammunition and explosives below 65 per cent of first class until after the War Materiels Reparations cases were decided. I give it as my opinion that following the decision in these cases, in which the railroads had supported the reasonableness of a 65 per cent of first class rate, they were able
11,570 without imperiling the claims they were making before the Commission to meet the request of the Department of Defense.

"The Department of Defense's written policies, as now contained in Department of Defense Directives, requires that the economic resources of the Department of Defense will not be employed in such manner as will adversely affect the 'economic well-being of the commercial transportation industry,' - 'preferential consideration in the routine procurement of transportation will not be accorded one mode of transportation as against another', and 'negotiations will not be conducted by attempting to play one carrier or mode of transportation against the other.'

"Also contained in Department of Defense directives are policies which require that the military departments use the least costly means of transportation which will meet

military requirements and which is consistent with the objectives of government procurement regulations and the transportation policies as expressed by Congress, con-
11,571 tingent upon carrier ability to provide safe, adequate, and efficient transportation. The attention of the Department of Defense has been invited by Congressional committees to the effect of their allocation of traffic on the welfare of carriers under the National Transportation Policy. The only reasonable implication that I can make from the circumstances concerning which we are testifying herein is that these policies were not thoroughly correlated by the Department of Defense, so that the critical rate reductions to which I have referred were allowed to take place.

"I give it as my further opinion that restoration of Section 22 rate levels on ammunition and explosives moving on government bills of ladings to 60 per cent of first class would in fact result in an increase in railway operating income derived from ammunition and explosives traffic, providing of course, that the existing department of defense directives are followed by the military departments.

"I give it as my further opinion that the present level of rail section 22 rates, which have been put into effect as a result of encouragement by the military is wholly inconsistent with the needs of the Department of Defense for a strong, well-equipped motor carrier industry to serve,
11,572 as the National Transportation Policy requires the needs of national defense.

"C. Effect of Unrestrained Section 22 Reductions on Individual Motor Carriers of Munitions.

"The prevailing section 22 rates are ruinous to the trucking industry since the average across-the-board decrease in rail rates on ammunition and explosives approximate 38 per cent -- decreasing the rate level on ammunition and explosives that was in existence in 1946. It is interesting to note in this connection that the accumulative percentage increase in the general commodity rate structure for the U. S. as a whole has increased 88.9 per cent over the rate level existing in 1946 (Transport Economics, March 1956, page 3.)

"An indication of the destructive effects of the 40 per cent of first class rail rate may be seen in appendix 5. The revenue derived at the 40 per cent level does not even cover the costs incurred by motor carriers in transporting ammunition and explosives for the military. And it should be pointed out that the four carriers used for the purpose of this appendix had been transporting these commodities for the military for many years. It is small wonder that many
11,573 of our motor carriers are not now willing or ready to transport Government ammunition and explosives.

"It is also pertinent to note in Appendix C that between the same two points, and over the same railroad lines, the rate on military ammunition and explosives moving under Section 22 are far below the rates on the same commodity transported for commercial shippers. Equally pertinent is the fact that the rate now in effect on rail shipments of military ammunition and explosives is far below the commercial

commodity rate on books, boiler cleansing compounds and machinery, as reflected in Appendix D, despite the traditionally high-rated nature of this traffic because of the risk factor.

"Ammunition and explosives from a classification point of view have been traditionally high rated. The National Classification Board has stated that for the most part ammunition and explosives are of relatively high density, and where such is the case the Board has always taken the position that of the fifteen elements that go into classification making the two most important with respect
11,574 to ammunition and explosives are value and risk. The consideration of these two important factors is in consonance with Commission findings as far back as the very first ICC volume published. In I.I.C.R. 465 the Commission stated:

" ' Hazardous and extra-hazardous freight -- are considerations of a controlling nature.' And again in Rates on Powder and High Explosives, 151 ICC 163, the Commission stated:

> " ' However, there is merit in the carriers' contention that every carload of dangerous explosives must be regarded as carrying a potential disaster in a degree much in excess of that of other traffic, and that notwithstanding the very many precautionary measures taken for safety there remains a danger in handling explosives which cannot be removed by human effort.

" ' In fixing rates on these commodities we should of course take into consideration the dangers attendant to their transportation and the service afforded by the carriers in order to avoid accidents from such transportation.'

11,575 "More recently, in War Materiels Reparations Cases, 294, ICC, 144, the Commission in finding the 65 per cent of first class rate, which was at issue in the proceeding, not to have been unreasonable pointed out that another pertinent consideration in judging the reasonableness of the rates is the high value of ammunition and explosives.'

"From World War II to October of last year the generally accepted rate on military ammunition and explosives under Section 22 was approximately 65 per cent of the first class rate -- the same rate the Commission found not to be unreasonable. But, as stated, last October in the face of this Commission finding the military asked the railroads for a drastic rate reduction on these commodities, and the railroads in Official Territory granted a rate reduction through the medium of Section 22 which slashed the rate to approximately 40 per cent of first class on a volume minimum carload weight of 90,000 pounds, which has since been followed by other territories.

"In response to a survey recently conducted by our conference, tonnage figures of member carriers have been tabulated for the months of August, 1955 -- before the rate reductions -- through July of 1956 -- which include the rate

reductions. We have attached as Appendix E the results of this survey as shown by several representative carriers of the Conference. The decline in monthly revenues and tonnages since the rate reductions is readily apparent.

"D. Who has Gained by the Depressed Rates?

"In order for the railroads to gain -- revenue wise, from the destructive rate cuts they have initiated under Section 22 on military ammunition and explosives they would have to transport over 90 per cent of the tonnage at the present rate level.

"Just prior to the railroad rate reduction in Official Territory in October, 1955 motor carriers were transporting 63 per cent of military ammunition and explosives while the rails had 37 per cent as their share. In March of 1956 the rail share had increased to 44.2 per cent as compared with 55.8 per cent for motor carriers. The most recent distribution figures of the military are not available but for the purpose of this statement we will assume as an exaggerated example, that the railroads today are transporting 90 per cent of the ammunition and explosives tonnage where the motor carriers are transporting only ten per cent.

"The Department of Defense has stated that of the total department of defense freight traffic expenditures for motor transportation in fiscal 1955, 12.1 per cent was for the transportation of ammunition and explosives by

motor carriers. Using these figures, then, plus figures submitted by Mr. Earl Smith, Director of Transportation and Communications, Office, Secretary of Defense, in testimony before the House Interstate and Foreign Commerce Committee on April 24, 1956 in connection with H.R. 6141, 6142 and 525 we can draw some definite conclusions. The total transportation bill for the Department of Defense in fiscal 1955 for domestic freight traffic was $537 million. Of this the motor carrier industry received 52.2 per cent, or $270.4 million.

"Of the latter figure, 12.1 per cent, or $32.7 million went for the transportation of ammunition and explosives by motor vehicle. This $32.7 million represented 63 per cent of the total bill of $52.3 million expended by the Department of Defense for the transportation of ammunition and explosives in fiscal 1955. The
11,578 railroad's share, therefore, before the rate cuts in October of 1955, was 37 per cent, or approximately $20 million.

"The movement of ammunition and explosives, it is estimated, has declined approximately 25 per cent during 1956. Using 1955 as our base, we will assume for the purpose of this example, that ten billion pounds of ammunition and explosives moved at a rate of .523 per cwt. and produced gross revenue of $52.3 million. If tonnage is now off 25 per cent, there would only be 7.5 billion pounds moving at .523 per cwt., which would produce gross

revenues of $39.2 million. At the same time, however, the rate has been reduced approximately 38 per cent across-the-board so instead of $39.2 million, the gross revenue on 7.5 billion pounds would be determined on a rate of .324 per cwt. This gives revenues of $24.2 million from all munitions moved at the lower rate.

"We have already stated that we are using the assumption that the rails are now transporting 90 per cent of the tonnage at the reduced rate. At 90 per cent of the total traffic, however, the railroads would be receiving the same gross revenue as they were when transporting only 37 per cent of the traffic at the 65 per
11,579 cent rate. What do we have, then, as a result of the depressed rate? The railroads are transporting 53 per cent more traffic for the same revenue they received before the inception of the depressed 40 per cent rate. More cars have been taken out of the commercial car pool and the railroads had not benefited financially. Who, can it be said, has profited by these depressed rates?

"Part IV.

"The management of each and every member of the Munitions Carriers Conference has been contacted and there is not a single one who believes a section 22 quotation of 40 per cent of first class is a reasonable rate. Many of them are prepared to testify that it is below the very minimum in the zone of reasonableness,

if not non-compensatory. Some carriers have declared forthrightly that they will not and cannot haul Class A and B explosives on such rates. A few would carry such rated explosives only on backhauls. It has only been because they were "forced" to do so that any of the carriers met the rail quotations.

"The Munitions Carriers are not bold enough to assert that the I.C.C. has uncontrovertible authority to
11.580 control the level of Section 22 quotations under Section 22, but it is believed by them that other provisions of the Act might be brought into operation under the circumstances of this proceeding.

"Section 22, as we know, is a part of the Interstate Commerce Act, and the Interstate Commerce Commission has been delegated the responsibility by the Congress for administering its provisions.

"No decisions presently exist, to the best of our knowledge, which exempts Section 22 from the control exercised by the Commission over other provisions of the Act. The courts have recognized the Commissions responsibility in this area by stating in Nashville C & St. L. Ry. Co. vs. Tennessee 262 U. S. 318, 323, that:

> "Section 22 must in this matter, as in others be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose * * Congress did not intend

by this provision concerning reduced rates
and free transportation, to create an instrument by
11,581 which the carrier was authorized in its discretion,
to subject interstate commerce to undue prejudice.* *

and in handling of Exhibits for exposition and Fairs, 235 I.C.C. 603, 604 (1939) the Commission in making reference to the Nashville Railway case, state.

"In the last mentioned case, the court held that Section 22 does not deny to the Commission the power to prohibit special reduced rates when they result in unjust discrimination or undue prejudice to interstate carriers.

That the Commission might have some jurisdiction over section 22 rates, should they get out of hand, was also affirmed by the Comptroller General of the United States on October 19, 1954, in an opinion in which he stated, in part:

* * * It was and is considered opinion of the General Accounting Office that traffic managers of the Federal Government are not charged directly with responsibility for the enforcement of the national transportation policy *** Applying that conclusion this Office will endeavor to see that payments made
11,582 for services procured are audited in conformity with the reduced rates tendered and accepted. It will not assume to pass upon any question as to whether

the rates so tendered are or are not in conformity with the declarations of National Transportation Policy for the reason that it considers that the determination of any such question requires a consideration of extensive pertinent factors for the evaluation of which it does not have the necessary facilities, and for the further reason that it does not have authority finally to resolve any questions of transgression of the National transportation policy that may be involved. If aggrieved carriers who consider themselves unwarranted victims of a disregard of the National Transportation Policy, notwithstanding that the award of the government business by reason of which they may consider themselves aggrieved was made pursuant to specific statutory authority for them to furnish transportation for the United States at free or reduced rates, elect to contest the assumed violation, this office considers that their protests or objections can be resolved finally and authoritatively only by reference of the question to the Interstate Commerce Commission or the Courts.

11,583 "The Comptroller General is in part, responsible for the "attention" that the military pays to low rates in expending its appropriations.

"The Interstate Commerce Commission is aware of the need to prevent destructive competitive practices and has so stated in such cases as Morton Salt Co. v. Alton R. Co. 264 ICC 71 (89) when it said:

"The Commission's minimum rate power where destructive practices tend to affect motor carrier transportation diversely, should be involved if the National Transportation Policy is to be observed."

And in I & S M 3901, Bakery Goods and Chemicals Eastern points, 54 MCC 551, June 10, 1952, Div. 2, when it said:

"In meeting motor carrier competition, rail rates on the same traffic as nearly as practicable should be on a parity with these published by motor carriers to and from the same points, except where rail carriers labor under a substantial disadvantage in meeting motor carrier competition."

The Munitions Carriers Conference believes that the Commission, as stated above, herein can, if it will, directly invoke the provisions of the National Transpor-
11584 tation Policy and Section 15a and its counterparts in the other parts of the Act, and either by direct order or serious and compelling admonition rectify this situation.

In a sense, this is no different than authorizing or prescribing the "hold-downs" that are sought in Ex Parte proceedings.

Admonitions have been given before to the railroads in Ex Parte proceedings. They have been taken seriously and acted upon.

There is no reason to believe that the railroads might even welcome a directive that would improve their

negotiation provinces among the military establishments. Certainly, the military, if it follows its declared policies to which I have made reference could raise no objection to such findings orders, or admonitions, for even they have been told to defer to the expertise and judgment of the I.C.C. in the premises.

Respectfully submitted

W. J. Burns Managing Director,

Munitions Carriers Conference.

VERIFICATIONS

Comes now W. J. Burns, Managing

Director, Munitions Carriers Conference,

11,585 American Truckings, Inc., Washington 6,

D. C., and deposes, and says that the statements of fact he has made herein are true to the best of his knowledge, belief and information; that this prepared statement is his own; that he has been authorized to prepare and make same by the Officers of the Munitions Carriers Conference and that the opinions and beliefs stated are his own and, to the best of his knowledge, well-founded.

* * *

11,586 Q. Colonel Flanagan, would you be so kind as to read your statement, or may I request you to go on with it.

A. Yes, sir. This statement was made on behalf of the Military Traffic Agency which agency through appropriate directives represents the Department of the Army, Air Force and Navy, including the Marine Corps. It is in reply to the verified statement of W. J. Burns, R. W. Collingsworth, C. Rex Jeans, George M. Hughes and Sam G. Tate, submitted on behalf of the Munitions Carriers Conference, Inc.

Q. Before you go to the next paragraph, can you -- you have identified Burns. Can you identify the other three.

A. Generally, they were truckers who were members of the Munitions Carriers Conference.

(Reading)

"It is still the opinion of the Military Traffic Management Agency that these verified statements on behalf of the Munitions Carriers Conference, Inc., should not be a part of this proceeding. This opinion is bottomed on the following primary factors:

a. That the alleged facts contained in the said statements are neither relevant nor material to the issues involved in this proceeding.

11,587 b. That the principal relief sought by the Munitions Carriers Conference, Inc., is beyond the jurisdiction of this Commission to grant.

"Some motor carriers engaged exclusively in the transportation of ammunition and explosives may consider themselves as 'specialized' operators in the sense indicated on page two of Mr. Burns' statement. So far as the Department of Defense is concerned, however, motor carriers, in order to qualify for the

movement of such traffic, need not have this specialized status. All carriers, of course, must have appropriate authority and must comply with the effective rules and regulations of the Department of Defense and the various regulatory bodies in order to participate in the movement of such military traffic.

"Many of the motor carriers used by the Military Departments in the transportation of ammunition and explosives are general commodity carriers whose explosives traffic constitutes but a relatively small portion of their total traffic. Among those are Riss & Company, Watson Brothers Transportation Company, and Hayes Freight lines.

11,588 "Mr. Burns further states that there are upwards of 1,000 motor carriers authorized by the Interstate Commerce Commission to transport commercial and military ammunition and explosives. It is noted, however, that of these,only 79 are listed as members of the so-called "national Conference."

"At Sheet 5 of his statement Mr. Burns makes reference to the rate level involved in War Materials Reparation Cases, 294 I. C. C. 144. This reference is not material in this proceeding. The issues are not the same -- in the Reparations cases rates for the past were involved. Here we are concerned with existing and future rates. In addition the rates involved in the earlier case were war-time rates.

11,589 "One of the arguments of the Munitions Carriers implies that the burden of explosives traffic of the military at low non-compensatory rates makes it necessary for the rail carriers to seek increases on other traffic. A study of Interstate Commerce Commission Quarterly Q-500 reports and of military traffic moving on Government bills of lading for the fiscal year 1956 above: (1) that the total national rail traffic amounted to 1,453,232,445 short tons providing revenues of $8,835,813,293.00; (2) that the national movement of ammunition and explosives traffic (I.C.C. Code 631) amounted to 1,461,813 short tons providing revenues of $53,717,903.00 or only one tenth of one per cent of the total national tonnage which accounted for six tenths of one per cent of the total dollars of revenue; and (3) that approximately 90 per cent of the total national movement of ammunition and explosives is military traffic which military traffic provides revenues of about $47,000,000.00. It is noted that the Interstate Commerce Commission has approved emergency increases in Ex Parte 206 which would furnish additional revenues to the rail carriers in the amount of approximately 500 million dollars. Comparison of this increase in revenues with the total revenues received on military ammunition and explosives traffic for fiscal year 1956 shows that the total

11,590 revenue on military ammunition and explosives traffic represents but nine per cent of the approximate 500 million dollars authorized by the Interstate Commerce Commission. It is

evident that the rail rate levels on military ammunition and explosives traffic have little or no impact on the total revenue needs of the rail carriers in the Ex Parte 20 proceedings.

"Attention is invited to Appendix A which compares commercial rail commodity rates on explosives traffic with the so-called 40 per cent of first class rate, and depicts carload earnings under these two (2) sets of rates. This exhibit clearly shows that railroad revenue per car and per car mile at the so-called 40 per cent of first class rate at a carload minimum weight of 90,000 pounds, applicable on military ammunition and explosives traffic, substantially exceeds such earnings on commercial explosives traffic moving on commodity rates. To illustrate, line 84, sheet 4, Appendix A, shows that the rail carriers parties to Tariff TC 1E, Agent W. J. Prueter, I. C. C. No. 1573, have established a commodity rate of 131 cents per one hundred pounds, minimum weight 20,000 pounds on explosives from Louviers Powder Works, Colorado to Sandia, New Mexico, a distance of 531 miles.

11,591 This rate which represents 44.3 per cent of the applicable first class rate produces car mile earnings of 50 cents and revenue per car of $262.00. For the same distance the military rate of Class 40 minimum weight 90,000 pounds (Docket 28300 scale) produces car mile earnings of 200 cents and revenue per car of $1,062.00. Also see line 164, sheet 9, Appendix A, which shows that the rail

carriers parties to PA Tariff 1690C, I.C.C. No. 3216 have established a commodity rate of 96 cents per one hundred pounds, minimum weight 20,000 pounds on explosives from Gibbstown, N.J., to Ashley, Pa., a distance of 160 miles. This rate which represents 58.1 per cent of the applicable first class rate produces car-mile earnings of 120 cents and revenue per car of $192.00. For the same distance the military rate of Class 40, minimum weight 90,000 pounds (Docket 28300 scale) produces car-mile earnings of 371.3 cents and revenue per car of $594.00. Also see line 38, sheet 2, Appendix A, which shows that the rail carriers parties to PSC Tariff 1 S, Agent J. P. Haynes, I.C.C. No. 1352, have established a commodity rate of 128 cents per one hundred pounds, minimum weight 40,000 pounds on explosives from Robert, California to Trojan, Oregon, a distance of 772 miles. This rate which represents but 35.2 per cent of the applicable first class rate produces

11,592

car-mile earnings of 66.32 cents and revenue per car of $512.00. For the same distance the military rate of Class 40, minimum weight 90,000 pounds (Docket 28300 scale) produces car-mile earnings of 170.20 cents and revenue per car of $1,314.00. Further reference to Appendix A discloses that rail revenue, both car mile and per car, for military ammunition and explosives is often double that obtained through commodity rates applicable on commercial explosives traffic. It will be noted that

all but 9 of the 187 illustrations shown in Appendix A, where the distance exceeds 160 miles, the minimum revenue per car ranges from $1000.00 to $1692.00, and even for these 9 exceptions where the mileages were from 247 to 451 miles the revenues range from $738.00 to $972.00 per car. By way of contrast it will be noted that only 3 of the 187 commodity rates shown produce revenues of as much as $1,000.00 per car."

BY MR. SHEA:

Q. Colonel Flanagan, I wonder if you will stop for a moment there and let the jury look through Appendix A and perhaps you could guide them to these references in Appendix A. If you will just take samples and show them precisely what you were testifying about?

Do you want to take Appendix A and refer the jury to it so they can see just what it is you are referring to in your testimony?

11,593 A. I think the statement is rather explanatory. If the jury wants me to go through this exhibit with them I will be most happy to do so.

Q. I would like to have them look to the appendix and have an opportunity to -- if you will just point out what is in the appendix?

THE COURT: Just as an example.

MR. SHEA: You don't have to go through. Just take a sample.

THE WITNESS: I will take the first sheet as your appendix starts, then, right after the verification of my sworn statement, and, for example, here, you see the origin point in Column 1, that shows "Trojan, Oregon," and you see the destination, Butte, Montana, you see the mileage figured out which is the official rail mileage between the two points, 740 miles.

You see the applicable first class rate, which is the 100 per cent of first class rate, 427, 427 cents.

You see the tariff authority for it.

You see the rail commodity rate that is established, not for the military but for a commercial shipper, of 372 cents. The tariff authority again, for the commodity rate.

11,594 Then you see how much weight the shipper has to offer, 20,000 pounds is the minimum he must meet.

Then you see the percentage that represents of the first class rate. You see the revenue per car per dollar, and the earnings per car mile.

And you take the same thing over here as what our traffic will give you, and you see a distance of first class rate docket, it's 354 cents, first class 40, is $1.42, 90,000 pounds; shows that the rail carrier will get $1,278.00 revenue for our car of traffic versus $744 for the commercial traffic that he will haul.

It shows he will get 172.70 cents for hauling our traffic per car mile, and only get 105.68 cents.

And again, the last thing, the difference between the two earnings, commercial and our traffic.

There are other cases throughout here which ranges even higher.

BY MR. SHEA:

Q. Colonel, I wonder if you would look to the next one, for instance, and take these 40,000 minimums and point out one or two of those and tell them what percentage of first class rate is being charged on that.

A. Yes, all right.

Well, here is one on Appendix A, Sheet 2, if you can see it. Down about line 34, I believe, which shows from Robert, California to Roseberg,

Oregon and shows 558 miles for the distance; 339 cents for the first class rate.

11,595 The tariff reference, the rail commodity rate of $1.28, the tariff reference, 40,000 pounds minimum, that the commercial shipper must load to.

The fact that that rate represents 37.8 per cent of the first class rate, that the rail carrier will receive for hauling that car on that minimum, $512, or 91.76 cents for the per car mile earnings, for every mile he hauls it.

You see again, now, on our proposal, what it does. First class rate, Docket 28-300, 299. The class 40, as we wanted it for our 80,000 pound shipments and better, $1.20.

Loading 90,000 pounds, produces a revenue, not of $512, but $1,080.00. It's almost twice as much.

And per car mile earnings, 193.54 cents, or over a dollar more than he gets per car mile for hauling commercial traffic, when he hauls military traffic.

Q. Well, in short, do I understand this to show that the railroads, in offering their services to others on the basis of tariffs for ammunition or explosives, were receiving less, and on 40,000 pounds they were down to 37.80, first class rate, as compared to the amounts they were getting for the Army and the rates they were charging the Army?

11,596 A. What this proposes to show, Mr. Shea, is that for the rate level that we suggested, and pushed with the rail carriers, was a reasonable compensatory rate, and they got less from commercial rates that they would haul commercial shipments for than they would for the military.

Q. Now, I wonder if you would return to page 6 and pick up again the first full paragraph, which, I think, is where you left off.

A. (Reading):

"Appendix A more than substantiates the findings of the Bureau of Transport Economics and Statistics which Bureau found that Section 22 rates ranged approximately thirteen to fourteen per cent higher than comparable commodity rates. Such findings were published in the August and September, 1955 issues of Transport Economics issued by the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission."

At this point, I must take an exception. If my memory is correct -- and the best I can recall in reading this, I believe this part was struck that I have just read, before the Interstate Commerce Commission.

11,597 MR. SHEA: I see.

THE WITNESS: If my memory is correct.

MR. SHEA: All right.

THE WITNESS: (Reading):

"The excerpts quoted in Part III of Mr. Burns' statement concerning Department of Defense directives are apparently used for the purpose of implying that the rates on ammunition and explosives traffic negotiated by the Department of Defense with the rail carrier were not thoroughly correlated by the Department of Defense, and are unduly depressed and unreasonably low. If such implications are intended, they are categorically denied. The initiation of negotiations by the Department of

Defense with the rail carriers was the culmination of an extensive study that extended over a period of two and one-half years. The findings of this study were carefully examined by each of the Military Departments and were fully coordinated and correlated prior to initiation of negotiations. During the course of the negotiations with the rail carriers, Mr. Burns was furnished a copy of the statement and exhibits presented to the rail carriers in support of the level of rates on ammunition and explosives sought by the Department of Defense. Mr. Burns was requested to comment or criticize this presentation but to this date has failed to do so."

11,598 BY MR. SHEA:

Q. May I just interrupt there?

Do I understand correctly from this that the Mr. Burns who represented the Munitions Carriers Conference, had been given copiesfor the presentations you made to the railroads in advance?

A. Mr. Shea, I personally gave him copies. I had a complete amount of pressure put on me at this time and I gave those copies to Mr. Burns, and said, "Pick them full of holes and tell me what is wrong with them.

Q. And they pointed out no holes?

A. Nothing to me, sir.

Q. So that the Munitions Carriers Conference, representatives of the truckers, had an opportunity to discuss it with you if they wanted in advance of the presentation of the railroads?

A. I wouldn't say that this was given in advance, I don't recollect, but they were given copies of the exhibits while the negotiations were still going on.

Q. And never commented on them?

A. Not to me, sir.

Q. Or never criticized them?

11,599 A. Not to me, sir.

MR. SHEA: Very well. Will you proceed?

THE WITNESS: (Reading):

"Mr. Burns' statement on page 2 quotes the Interstate Commerce Commission in MC-200 (Sub No. 84) to the effect that the Examiner stated and the Commission later affirmed 'that the transportation of dangerous explosives by motor vehicle, relatively speaking, provides no greater hazard to the public than the transportation of such commodities by rail' Riss and Company, Inc., Extension - Explosives, 64 M.C.C. 299, 319. He could have further quoted this case as follows: 'That the dangerous explosives here considered (military explosives) are relatively stable in character and are designed to withstand rugged transportation conditions; that the transportation of dangerous explosives over the present highway system by properly qualified motor carriers under the Commission's safety regulations is not a particularly dangerous service **** The position of both the Commission and Mr. Burns, which positions are concurred in by the Military Traffic Management Agency, are

in conflict with the position which appears on Sheet 4 of the verified statement of Mr. Sam G. Tate as follows: 'It is
11,600 meant to imply that the movement of explosives, as found by the Interstate Commerce Commission heretofore, is a hazardous business and one that is entitled to reasonable rates to offset the additional expenses incurred in transporting such a commodity safely and efficiently.' Similar disparities appear to exist in connection with the positions of Messrs. Hughes and Collinsworth as shown on Pages 3 and 4 of their respective verified statements. Studies made by the Department of the Army relative to losses and accidents from rail handling of explosives establish that rail movements of this commodity likewise is not a particularly hazardous service. See Appendix B attached hereto which shows pertinent data for the years 1943 through 1953. Appendix C shows similar data in connection with the movement of gasoline. Appendix D compares the percentages of loss and damages to gross revenues of explosives and other commodities for the years 1950 through 1953. Additional data on the handling of explosives has been gathered for the calendar years of 1954, 1955, and 1956. In 1954, there were no injuries or fatalities from the rail transportation of military ammunition and explosives. Three accidents occurred amounting to a total property and cargo loss of $47,205.98.
11,601 Rail revenues from military ammunition and explosive traffic for the year 1954 amounted to approximately 54 million dollars.

Total losses for 1954, therefore, represent only nine-tenths of one per cent of the revenue obtained from the rail transportation of military ammunition and explosives. This claim ratio compares most favorably with the total national rail claim ratio to revenue which was 1.168 per cent for the year 1954. Information obtained from the office of Mr. H. A. Campbell, Bureau of Explosives, shows the following losses from the handling of all explosives traffic during the years 1955 and 1956. During 1955, no explosions but damages to ladings amounted to $4,009.00. During 1956, no explosions but damages to ladings amounted to $6,578.00, of which $4,585.00 were sustained on military traffic. The principal military loss was due to the damaging of one (1) case of rockets in the amount of $4,230.00.

"The Military Traffic Management Agency is convinced that a ratio of 65 per cent of the first class rate is not a reasonable rate for the movement of military traffic of ammunition and explosives via highway carriers. This agency is not prepared to state, at this time, what rate would be considered to be a reasonable rate for
11,602 this traffic. An extensive study on this question was initiated during the latter part of 1955. This study is still being progressed as it is believed that every conceivable rate-making factor must be fully explored before the Military Traffic Management Agency will be in a position to state to the motor carrier industry what rate level

is considered reasonable for the transportation of ammunition and explosives. Attention in this connection is invited to the fact that over two and one half years were devoted to a most extensive study of rail ammunition and explosives traffic and pertinent rate making factors prior to any initiation of negotiations on such traffic with the rail carriers. It is interesting to note that tariff commodity rates published by motor carriers for the transportation of explosives traffic are in many instances well below 60 per cent of the first class motor rate. Attention in this connection is invited to Appendix E which lists certain commodity rates on explosives traffic maintained for the account of a number of motor carriers. It is particularly interesting to note that these rates range from 25 per cent of the motor carrier first class rate to 78 per cent of the motor carrier first class rate with the

11,603 majority of these rates reflecting 43 per cent of the motor first class rate. Not shown in Appendix E are rates published on explosives, N.O.I. and fireworks, N.O.I., by Hayes Freight Lines, Inc., in that company's motor freight tariff No. 89, MF I.C.C. No. 277. These rates are volume minimum rates with a minimum of 90,000 pounds. The rates from Falls Junction and Willow, Ohio, to Crane, Indiana, are 100 cents per one hundred pounds which rates reflect 37.1 per cent of the rail docket 28300 first class rate of 269 cents. Similarly, the rate from Westerville, Ohio to Crane, Indiana is 88 cents per one hundred pounds which rate reflects 31.3 per cent of the rail Docket 28300 first class rate of 281 cents."

BY MR. SHEA:

Q. Colonel, I wonder if you would permit an interruption at this point:

Could you refer the jury to Appendix E? Do you have that?

A. I am trying to find it, sir.

Q. Well, that is two sheets from the end, isn't it, Colonel?

A. Yes, sir, that's correct.

Q. It is next to the last exhibit there.

11,604 A. Yes, sir, that's correct.

Q. I wonder if you would -- I am looking at two pages from the end of Appendix E.

A. Two pages?

Q. Yes. Would you interpret two or three of these items for the jury, taking from some place in Utah to Ely, Nevada, and McGill, Nevada, and so forth, and just indicate to them what this shows?

A. Yes. Here is one down quite a ways down. Just any one of them will do for an example, though -- 1, 2, 3, 4, 5, 6, 7, 8, 9 -- about nine down shows a movement from Salt Lake City, Utah, to Ruth, Nevada, and the mileage short line is next shown. Then the applicable first class rate by motor, which is 334 cents; the tariff reference, and then the actual rate charged for the commercial explosives movement.

Then the tariff reference for that commodity rate, the minimum truckload rate, the weight that you must offer, 40,000 pounds.

Then it shows that that equals 25 per cent of the first class motor rate. Thats what the rate actually is; in other words, what they are charging reflects 25 per cent of the going first class rate.

Then this shows the revenue, the next Column shows the revenue

he gets per truck for hauling, and shows the revenue per truck mile that he gets for hauling at that rate.

11,605 Q. Colonel, this first class motor carrier rate, is that roughly the same as the first class rail rate?

A. Roughly, yes.

Q. Roughly?

A. Roughly, yes, sir, and the rates are competitive. There is differences now, but they are roughly the same.

Q. As I look down Exhibit "E" where a minimum of 40,000 pounds is specified by the motor carriers, they were charging, so far as I am able to see here, in almost every instance under 30 per cent of their first class rate. Is that correct?

A. It is so indicated on this sheet.

Q. And does that indicate -- what is the time of which this speaks, do you recall?

A. The rates in effect are about 1957, I would say, 1957.

Q. 1957?

A. Yes.

Q. So that on commercial traffic, if I understand from this -- on commercial traffic the motor carriers, to meet competition, were charging commercial movers of ammunition and explosives where the minimum was 40,000 pounds, 30 per cent or less of the first class rate?

11,606 A. I don't quite follow your question. It was quite lengthy.

Q. Let me restate it:

Does this indicate that on movements of commercial traffic, for other shippers than the Defense Department, the motor carriers were offering on a 40,000 pound minimum--were offering 30 per cent of their first class rate?

A. Yes, sir.

Q. Or less?

A. Yes, sir.

Q. Well, will you return, then, to page 11, the first paragraph?

A. (Reading):

"The rail portion of military ammunition and explosive tonnage dropped from over 90 per cent of the total in early 1950's to a low of only 37 per cent during 1954."

BY MR. SHEA:

Q. May I interrupt there?

When you say "to a low," do you know for how long that low persisted?

A. I really don't know, sir, how long it persisted. This was the low during 1954.

11,607 Q. This is at a particular point?

A. Yes, a particular point.

Q. It doesn't purport to represent the particular year.

A. No, sir, this is a particular point during 1954.

Q. Would you want to go on, now, Colonel?

A. (Reading):

"In the last paragraph of Part II of his verified statement, Mr. Burns states that interstate motor carriers are presently transporting two billion pounds (or 1,000,000 tons) of ammunition and explosives annually. This appears to compare very favorably with the rail tonnage of approximately 1,400,000 tons transported during fiscal year 1956."

Q. Could I just interrupt there again, Colonel?

I asked you about point to point quotations earlier and whether the actual movements were not on rates at much lower than 65 per cent.

You remember our discussion of that?

A. Yes, sir.

Q. Do you recall between May and September, when you first started talking to the East, and prior to the time of the Eastern Rate Bureau, TEA, and prior to the time they put in the actual rates -- do you remember anything of what the point to point quotations were in Eastern Territory on movement of ammunition and explosives?

11,608 Do you remember whether a 40 per cent rate was actually put in on a point to point basis?

A. By whom?

Q. By certain of the railroads? A. Yes, sir.

Q. By individual railroads?

A. Yes, sir, it was. Before the entire Eastern carriers gave us the rates that we sought, two independent actions were taken and they were taken at our request, one with the B & O Railroad and one with the Pennsylvania Railroad.

I would like to point out this, in mentioning this, that certainly a rate-making body cannot control its members. Under Section 5-A of the Act they have got the right to take independent action.

Apparently not doing too well with the negotiations with the rate-making body at that time, we approached these carriers separately and asked for the rates established, and we were successful. My belief is it had a pretty good impact on the Eastern Territories.

Q. Is it or is it not the fact, Colonel, from your knowledge, that there was vigorous competition on a point to point basis prior to the rate adjustment and continued to be vigorous competition on a point to point basis after the adjustment between rails and truckers.

A. That's my general understanding. I did not route freight.

11,609 Q. And is it not also true, as indicated here -- and from your general knowledge -- that after the rate adjustment, truckers continued to move a substantial part of Goverment ammunitions and explosives?

MR. WRIGHT: I object to the leading form of that.

If the Colonel knows he could be asked what his knowledge is as to the relative share of the movements.

THE COURT: Well, he has already asked the question. Do you know?

THE WITNESS: I can't give any figures that I have relative to the share.

BY MR. SHEA:

Q. Do you know if it is a substantial portion?

THE COURT: Well, of course, there is an objection to the leading question. Do you know, Colonel?

THE WITNESS: All I know is generally, sir, because, you see, I didn't route freight. I talked to people that did, naturally, we worked in the same office, the same building, and the same floor level, and it has to be hearsay, what I heard from them.

11,610 THE COURT: Do you object to that?

MR. WRIGHT: Yes, I do.

THE COURT: I will sustain the objection.

BY MR. SHEA:

Q. And you continued, did you, after the rate adjustment, to get many point to point quotations?

A. Yes, sir. That I can testify, we got many point to point quotations by motor carrier after the rate adjustment reducing the previously-established rate levels.

Q. Do you want to go on?

Colonel, I take it, at least as of the time this talk, which I believe you said was in 1957, that you indicated that a very substantial part of the traffic was moving by motor carrier, a very substantial part of the ammunition and explosives traffic was?

A. For fiscal year '56.

Q. Now, would you go on, Colonel, with the remainder of your statement?

A. (Reading):

"It would, therefore, appear that the sole purpose of the munition carriers is to prevail upon the Commission to establish an unrealistic floor under military munitions rates. They hope in this way to not only regain the tonnage which has been recovered by the rail carriers but ultimately to transport practically all such traffic, without regard to the proved ability of the rail carriers to transport these
11,611 commodities safely, efficiently, and profitably at the existing level of rates. In effect they request the Commission to ignore that portion of the National Transportation Policy which requires the preservation of the inherent advantages of the various modes of transportation. The prescription of minimum rates is a matter which should be approached

with great caution. Certainly it should not be done by way of a collateral issue in a proceeding such as this. As Commissioner Freas so aptly stated at the 26th Annual Meeting of the Interstate Commerce Commission Practitioners: 'Rate structures should be living things fully responsive to changing transportation and commercial needs. To the extent there is regulatory interference in setting minimum rate levels it should be to minimize promiscuous rate cutting. It should not, in my opinion, serve as an umbrella for the prodigal and inefficient. Neither shall it be exercised with the abandon that operates to stifle normal healthy competition which plays an important part in bringing about good service at the lost cost consistent with maintaining in full vigor all necessary transportation agencies.' "

11,612 CROSS EXAMINATION

BY MR. WRIGHT:

Q. Colonel, I would like to direct your attention first to these tables that you have attached to the statement here, your Appendix A, in which you make these various comparisons between these Section 22 rates in one column and commercial commodity rates in the other.

I am referring now to your Appendix A. Take a look at the first sheet, if you will.

A. If I understand your question, you said, does this compare commercial rates versus the return on our rates, the 28-300 docket?

Q. You have on the left-hand side there, commercial commodity rates. Do you see that?

A Do I understand your question? You are asking, does this compare commercial rates with what the rates would be for the military traffic? Is that your question?

A I say, that is what it purports to do on its face, isn't it?

A Yes, that is what it shows. That is what it shows, if that is your question.

Q And you had the commercial commodity rates listed in the left-hand side; isn't that right?

A That's correct, sir.

11613 Q And then you have military Section 22 rates listed on the right-hand side. Is that right?

A Not quite correct. That shows what the military rate would be under Section 22 Docket 28,300 rates that were established by the rail carriers.

Docket 28,300, of course, would not apply in this territory here. The rate level is a little higher than Docket 28,300 in this particular territory. 28,300 is even lower; if we used Class 40 of the actual first class rate applicable in that territory, it would show even higher returns.

We used a Docket 28,300 for Official and Upper Mountain Pacific, rugged territory.

It would be even more if we used the first class rate there, in any event, than the 40 per cent.

Q You didn't attempt to use the actual rate in effect. Is that what you are telling me?

A No, I did not, because we have proved it well enough here. The actual rate level in that territory by rail is higher than the 28300. If we

took 40 per cent of that rate it would show even higher mile earnings and car mile earnings.

Q. Let me see if I follow your comparisons here:

Now, you show in the second or the fourth column, under commercial commodity rates, the applicable first class rate of 427.

11,614 A. Which line? Oh, I see. You are using the very first line.

Q. Yes.

A. All right. I'm with you.

Q. And then under Column 6 that is an actual rail commodity rate in a published tariff, isn't it?

A. That's correct, sir.

Q. 372. A. That's correct, sir.

Q. Which was 87.1 per cent of the first class rate?

A. That's correct sir.

Q. And that had a 20,000 pound minimum.

Then over in Column 10 you show revenue per car, $744. Is that correct? A. That's right.

Q. And at that revenue per car you computed by multiplying 20,000 pounds by the 372 rate; is that right?

A. To get the total revenue, yes.

Q. Is that the way it was figured?

A. Let me see. I will have to recheck just to be sure but I think that is the basis for it.

Q. I assume the same method of calculations --

A. Yes, that is the general basis for calculation.

Q. As to what is done in each case.

A. Yes, that comes out to $744.00.

11,615 THE COURT: Just a minute :

Let me suggest this, Colonel:

I would appreciate it if you would wait until counsel propounds his question and then answer, and the same way with you, Mr. Wright, wait until the witness finishes his answer.

MR. WRIGHT: Yes, sir.

THE WITNESS: Thank you, Judge.

BY MR. WRIGHT:

Q. You have looked at that and you can see, I take it, that you get the figure in Column 10, the revenue per car, by multiplying the rate in Column 6, 372 times the minimum weight figure in Column 8, 20,000 pounds. Isn't that right?

A. That's correct.

Q. And then you call that, in Column 10, revenue per car, and you get $744.00. Is that right?

A. Right.

Q. And then over under your section of military, section 22 rates, you have a rate there which you call under Class 40 rate of $1.42. Is that right?

A. Correct, sir.

Q. And then you get the revenue per car by multiplying that $1.42 by 90,000 pounds. Is that right?

11,616 A. Correct, sir.

Q. And then you get the revenue per car by multiplying that $1.42 by 90,000 pounds. Is that right?

A. That's correct, sir.

Q. And you show that 90,000 pounds as a minimum weight.

Now, actually, there was no minimum weight requirement of 90,000 pounds in any of these quotations you got, was there?

A. No. The rate level we got was 45, 40 and 80 per cent of 45 on the amount over 40.

But by arithmetical computations, if you will follow through, I think you can prove to your own satisfaction that at 90,000 pounds you hit Column 40, or 40 per cent.

Q. Well, what you term a minimum weight in Column 8 of your commercial commodity rate tabulation there was an actual published minimum weight which was part of the quotation, was it not?

A. Will you rephrase your question again, or repeat it?

Q. I say, in the figures which appear under the heading "Minimum Weight, Pounds," in Column 8 under the section of your table there that is headed "Commercial Commodity Rates," that refers to an actual minimum weight specified in the tariff, does it not?

11,617 A. That's correct.

Q. But when you get over here to your military section 22 rates, what you call a minimum weight in pounds there is not anything that was specified in the quotation at all, is it?

A. No. It is the point break where you will hit Column 40 or 40 per cent of the first class rate, and it shows what it is purported to show.

Q. And it has quite a different meaning in that column than it has where you use it in Column 8 under your Commercial Commodity Rates?

A. You may think so, if you wish.

Q. Well, in any event, that is the minimum weight of 90,000 pounds was not specified in any of the quotations that you are referring to in this tabulation; isn't that right?

A. No, it is not specified in the quotations. It is the rate level weight that will hit the Column 40 which we were looking for, and as the General testified we were looking for.

Q. Then when you got what you called a figure for revenue per car in dollars, you simply multiplied, did you not, the $1.42 rate there times 90,000. Is that correct?

A. You are correct.

11,618 Q. And then you have a final column that says "Difference." Or excuse me.

Then you convert in each case, first on the commercial rates after you get a revenue per car -- you convert that into a figure of earnings per car mile, and you do that by dividing the revenue per car by that mileage figure that is in Column 3?

A. Yes, I believe that's correct.

Q. That gave you $105.68 for the commercial rate. Isn't that right?

A. That's right, sir.

Q. Or that is 100 -- excuse me -- that is 105.68 cents.

A. Yes.

Q. Which would be, I take it, $1.05 plus?

A. $1.05 plus, that's right.

Q. Then on Section 22 rate you do the same thing, you take the revenue per car that you figured, by multiplying 90,000 times the rate,

$1,278.00, and you divide that by the mileage to get a per car mile figure of what would amount to $1.72 plus. Isn't that right?

A. That's correct, sir.

Q. And then you show in the final column a difference which you call "Difference per mile earnings," on the commercial quotations as against the military quotation, and that is obtained, was it not, by deducting the per car mile earning figure you have under commercial rates, from the earning per car mile figure you had under the military rate?

11,619 A. Yes, sir.

Q. That represents the difference between the two?

A. That's right, sir.

Q. And that difference was supposed to suggest, was it, that the railroads were earning more under the military rate than under the commercial rate? Was that the impression this is supposed to give?

A. It shows that if you took the 28300 docket rate at Column 40, which granted a greater monetary benefit to the Government, and compared that rate with the minimum weight involved to reach Column 40, that the rail carrier would earn much more on that basis on hauling military traffic than it would on tariffs that were open to the commercial explosives shippers to move. That is what it purports.

Q. Well, you made that showing, did you not, by comparing a carload of 90,000 pounds moving on the military rate with a carload of 20,000 pounds moving on the commercial rate. Isn't that correct?

11,620 A. You are absolutely correct.

Q. And I suppose that it really is quite plain, isn't it, without any elaborate schedule of this kind, that any railroad is going to make more per car on a 90,000 pound load at any given rate per pound than on a 20,000 pound load. Isn't that so?

A. I believe you are right, sir. The inherent advantage of the rail carrier is a heavy loading, as General Lasher testified. The more tons that you can put in the car, and offer to the rail carrier, the more he can reduce the price and come out in a good healthy compensatory shape.

Q. Well, your table doesn't really show at all, does it, that the military rate that you are comparing there with the commercial rate was in fact a higher rate at all. It was in fact a substantially lower rate. Isn't that right?

A. Mr. Wright, would you rephrase your question?

You have gone through a series of discussion here that has almost gotten me confused now. Would you break your questions up a little bit?

Q. I don't want to confuse you, Colonel.

A. No, I don't want to be confused, sir.

Q. But it is quite clear, isn't it, that these rates you have got here, in every case, the military rate was, or at least let's stick to this first one here, the one I have just been discussing -- the actual military rate per pound was less than half of that of the commercial rate?

11,621 A. I won't say less than half. It was less.

Q. Well, 142 as against 372 -- isn't that what it says?

A. Well, certainly, sir, heavy loading, which has been testified by the General, is inherent ability to load heavy on our part, and inherent ability of the rail carrier to haul heavy loads.

Well, we see and feel he can have the lower price for commercial tonnage.

If the commercial carrier can only load 20,000 pounds, all right, you have to charge him more.

Q. If you had chosen to compare the figures on a 20,000 pound car at the 142 rate as compared with what the railroad would earn at a 90,000 pound car, you would have had even a greater discrepancy, wouldn't you?

A. Repeat that question, please.

Q. I say, if you wanted to make a comparison of the difference in earnings between heavy loadings and light loadings, you didn't have to use two rates at all, did you? All you had to have is to take one rate and multiply it by 20,000 pounds to find out what a 20,000 pound car would earn you, and you multiply it by 90,000 and you get what a 90,000 pound car earns. Is that right?

11,622 A. Well, I don't know what you are aiming at, but this shows what the rate was in existence for the commercial shipper. It shows here he had to load 20,000 pounds to get that rate, and that's all.

It shows, in order for our rate, we had to load 90,000 pounds. And certainly you can't divorce the rate from the minimum weight.

Q. Well, it was not a fact, was it, that in order to get the rate the railroads were offering you, you did have to load 90,000 pounds. That simply isn't true on the basis of the quotation, is it?

A. As I recollect, Mr. Wright, I stated in this testimony, it has been stated from the stand before, that what the Army sought and what the Department of Defense sought was 40 per cent of the first class rate. We got 40 per cent, if you can compute it out, in the 90,000 pound loading, and this is what this purports to show, is the earnings to the rail carrier at 40 per cent of the first class rate at 90,000 pound loading.

Q. Now, let me see if we understand what these quotations are that you are talking about:

Are you talking about the quotations which are of evidence here which say in so many words that the rate you were getting was 45 per cent on a minimum carload of 40,000 pounds and 36 per cent on the excess over 40,000 pounds? Am I correct?

11,623 Have I correctly stated the quotation that was made to you or haven't I?

MR. SHEA: If the Court please, this is not a fair representation of that quotation.

THE COURT: You are objecting?

MR. SHEA: I object on the ground it is not a fair assumption.

THE WITNESS: I think I understand the question.

THE COURT: The Colonel says he thinks he understands the question.

THE WITNESS: Let me restate the question to be sure I understand it.

THE COURT: Let the reporter read it to you. Be sure you understand it though.

THE WITNESS: O. K., yes, that is what I want to be sure of.

THE COURT: All right.

MR. WRIGHT: The quotation is 201 and I will be glad to give you the 200, if you want that too, giving an account of the meeting where the proposal was considered by the Traffic Association.

THE WITNESS: Thank you, Mr. Wright.

(Thereupon the reporter read as follows:

11,624 "Question: Now, let me see if we understand what these quotations are that you are talking about:

"Are you talking about the quotations which are of evidence here which say in so many words that the rate you were getting was 45 per cent on a minimum carload of 40,000 pounds and 36 per cent on the excess over 40,000 pounds? Am I correct?

"Have I correctly stated the quotation that was made to you, or haven't I?"

THE WITNESS: That's why I wanted the question repeated, so I could follow it:

You are stating to me, Mr. Wright, that the quotation shows 36 per cent of the first class rate.

It does not, no more than it shows 40 per cent of the first class rate.

At 90,000 pounds you will hit 40 per cent of the first class rate.

* * *

OUT OF PRESENCE OF THE JURY

11629 MR. McGLOTHLIN: Pursuant to leave granted by Court to file objections, on behalf of certain defendants who -- the admission against them of exhibits which were originally admitted not against them, I am now filing objections on behalf of the Pennsylvania Railroad, the Baltimore and Ohio Railroad, and the Erie Railroad, and I will provide the plaintiff with copies.

THE COURT: All right.

"Objections of Defendant (66) The Pennsylvania Railroad Company to Certain Exhibits Offered by Plaintiff.

"Pursuant to leave granted by the Court on June 6, 1960, defendant (66) The Pennsylvania Railroad Company hereby makes its objections to the admission into evidence of the following exhibits now offered against all defendants and not originally offered against this defendant, on the grounds stated:

"1. To plaintiff's exhibits 189, 189-A, 189-B, 190, 206, 207, 207-A, 208, 209-B, 209-C, 224, 224-A, 257 through 276 inclusive, and 278 through 280 inclusive, on the ground that the same are based on answers by other defendants to interrogatories, and such answers are hearsay as to this defendant, in that

the service of such answers was not in any sense an act or utterance within the scope or in furtherance of the object of any conspiracy charged against this defendant.

11630 "2. To plaintiff's exhibits nos. 40, 41-A through 41-N inclusive, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 59, 60, 61, 63, 63-A, 64, 66, 67, 68, 69, 71, 127, 183, 184, 185, 186, 187, 194, 195, 197, 197-A and 199, as well as to plaintiff's exhibits listed in paragraph 1 above, on the ground that such exhibits are hearsay as to this defendant, in that none of them is evidence of any act or utterance within the scope or in furtherance of the object of any conspiracy charged against this defendant.

"3. This defendant adopts all objections of any other defendant to any plaintiff's exhibit not originally offered against this defendant, and reaffirms all objections this defendant has heretofore made to any such exhibit.

"James H. McGlothlin
Attorney for Defendant (66)
June 8, 1960"

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

"RISS & COMPANY, INC., Plaintiff,	)	
v.	)	Civil Action No. 4056-54
ASSOCIATION OF AMERICAN RAILROADS, et al. Defendants.	)	

11,631

"OBJECTIONS OF DEFENDANT (11) THE BALTIMORE AND OHIO RAILROAD COMPANY TO CERTAIN EXHIBITS OFFERED BY PLAINTIFF

"The Defendant, the Baltimore and Ohio Railroad Company, objects to the admission into evidence of the following exhibits now offered against all defendants, and not originally offered against this defendant, on the grounds stated below:

"1. To Plaintiff's Exhibits No. 189, 189-A, 189-B, 190, 207, 207-A, 208, 209-B, 209-C, 224, 224-A, 257 through 276, inclusive, and 278 through 280, inclusive, on the ground that these exhibits are based on answers by other defendants to interrogatories, that such answers are hearsay as to this defendant, and that such answers were not in any sense an act or utterance within the scope or in furtherance of the objectives of any alleged conspiracy charged against this defendant.

"2. To Plaintiff's Exhibits Nos. 5, 37-A, 37-B, 37-C, 40, 41, 43 through 105, 106 through 109, 111, 133 through 139, 141 through 188, 191, 194 through 199, 210, and 211, as well as plaintiff's exhibits listed in paragraph

1 above, on the ground that such exhibits are hearsay as to this defendant, and none of such exhibits is evidence of any act or utterance within the scope or in furtherance of the objectives of any alleged conspiracy charged against this defendant.

11,632 3. This defendant reasserts all of the objections made heretofore by it to plaintiff's exhibits and adopts all objections of any other defendants made to any of plaintiff's exhibits admitted in evidence.

"James H. McGlothlin

"James C. McKay

"701 Union Trust Building
Washington, D. C.

"Attorneys for Defendant, the
Baltimore and Ohio Railroad Company"

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"IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

"RISS & COMPANY, INC., Plaintiff, v. ASSOCIATION OF AMERICAN RAILROADS, et al., Defendants.	Civil Action No. 4056-54

"OBJECTIONS OF DEFENDANT (29) ERIE RAILROAD COMPANY TO CERTAIN EXHIBITS OFFERED BY PLAINTIFF

"The defendant, Erie Railroad Company, objects to the admission into evidence of the following exhibits now offered against all defendants and not originally offered against this defendant, on the grounds stated below:

11,633 "1. To Plaintiff's Exhibits Nos. 189, 189-A, 189-B, 190, 207, 207-A, 208, 209-B, 209-C, 224, 224-A, 257 through 276, inclusive, and 278 through 280, inclusive, on the ground that these exhibits are based on answers by other defendants to interrogatories, that such answers are hearsay as to this defendant, and that such answers were not in any sense an act or utterance within the scope or in furtherance of the objectives of any alleged conspiracy charged against this defendant.

"2. To Plaintiff's Exhibits Nos. 37-A, 37-B, 37-C, 40 through 105, 106 through 133, 135 through 139, 141 through 188, 191, 194 through 199, 210 and 211, as well as plaintiff's exhibits listed in paragraph 1 above, on the ground that such exhibits are hearsay as to this defendant, and none of such exhibits is evidence of any act or utterance within the scope or in furtherance of the objectives of any alleged conspiracy charged against this defendant.

"3. This defendant reasserts all of the objections made heretofore by it to plaintiff's exhibits and adopts all objections of any other defendants made to any of plaintiff's exhibits admitted in evidence.

"James H. McGlothlin

"James C. McKay

"701 Union Trust Building
Washington, D. C.

"Attorneys for Defendant,
Erie Railroad Company"

* * *

CROSS EXAMINATION OF COL. FLANAGAN BY MR. WRIGHT

11,635 Q. Now that you have looked at the quotation that is represented by Exhibit 201, it is clear, is it not, that the minimum loading requirements specified in the quotation is not 90,000 pounds, but 40,000 pounds. Isn't that correct?

A. Looking at the quotation first established is a Class 45 weight, rate, at weight 40,000 pounds.

Additionally established is a reduction of that rate by 80 percent of any excess of 40,000 pounds loaded in the same car.

Q. So that it is clear from the quotation that in order to qualify for the 45 percent rate, all you had to load was 40,000 pounds. Isn't that right?

A. That is correct. The 45 applies on 40,000.

Q. And then the rate that would apply on the excess would be 80 percent of 45 or 36 percent, isn't that right?

A. Well, roughly speaking, it is going to go down, of course, as you load higher.

Q. What I say is not roughly speaking, but accurately speaking, the 36 percent is the rate that the excess over 40,000 pounds carries. Isn't that right?

A. Eighty percent of 45.

Q. And so that when you get up to 90,000 pounds, now, you have the first 40,000 carried at 45 percent, and the next 50,000 at 36 percent and the result is that on a 90,000 pound shipment, the applicable rate is 40 percent, that's the way it figures, isn't it?

11,636 A. That is correct, sir.

Q. Now, I was a little puzzled by what these comparisons that you had on -- in your Appendix A of the statement that you made --

* * *

MR. SHEA: Does the witness have a copy?

MR. WRIGHT: I am going to give him the one that was received in evidence. The exhibit no. I now see is ACL 501.

(Copies are distributed to the jury.)

BY MR. WRIGHT:

11,637 Q. And do you recall, Colonel, that at the close of the session yesterday, I had been examining you about the figures you had in the Appendix A of that Exhibit ACL 501, on sheet one, the first item you had there that refers to rates from an origin point at Trojan, Oregon, is that -- to a destination of Butte, Montana, a distance of 740 miles, it looks like --

And I think you described for me how you had computed the revenue per car figures that you had under the commercial commodities rates and the revenue per car figures that you had under -- listed under the Military Section 22 rates.

Do you recall that?

A. (Pause.)

THE COURT: Will you answer instead of nodding your head?

THE WITNESS: I will answer yes. Thank you, Your Honor.

BY MR. WRIGHT:

Q. I believe you said that in making those comparisons which were shown on the first line thereof, $1278 is the revenue per car under the Section 22 rate, you got that by taking the rate shown in Column 13 there of $1.42 per hundred, isn't it?

A. Yes, sir.

Q. And then qualifying that by 90,000 pounds. And then on the -- you got the $744 figure that appears in Column 10 by multiplying the rate that appears in Column 6, $3.72 per hundred pounds, is that it?

11,638 A. Yes, sir.

Q. Times 20,000 pounds.

A. What?

Q. Times 20,000 pounds. A. Yes, sir.

Q. That was the way you got $744?

A. Yes.

Q. And I was puzzled as to what the significance of such a comparison was insofar as any of the issues which we are trying to determine here is concerned.

What is it that this shows that you think throws light on something that we are concerned with here?

MR. SHEA: If Your Honor please --

THE COURT: Well, let's find out if he knows what we are concerned with, if he understands the issues.

MR. WRIGHT: I think that would be helpful, Your Honor. This statement, I gather, that you have in front of you, was not made for a -- use in this connection with this controversy here at all, was it?

THE WITNESS: No, it was not made for this purpose in this case at all, --

MR. WRIGHT: This statement that you have here --

THE WITNESS: It may serve a purpose here, but it is not made for this purpose.

* * *

11,639 Q. The exhibit that you have in front of you there, that's ACL 501, is it, your statement in Ex Parte 206, that was made by you for the sole purpose of replying to certain statements that had been made in that proceeding by Mr. W. J. Burns, Mr. R. W. Collingsworth, C. Rex Jeans, George M. Hughes, and Sam G. Tate, which were submitted on behalf of the Munitions Carriers Conference, Inc. Is that correct?

11,640 A. The primary purpose of the statement and the exhibit was in reply to the statements you just quoted, Burns, Tate, etc. However --

Q. To be --

A. However --

MR. SHEA: Just a minute, now --

THE WITNESS: However --

THE COURT: Just a minute.

MR. SHEA: Let the witness finish. He is constantly interrupting.

THE COURT: All right. He may finish his statement.

THE WITNESS: However, involved within this statement, too,was an opportunity we took to present before a public body and before an audience what we had sought from the rail carriers and what we had adopted from the rail carriers as a negotiated rate basis, was right, proper, reasonable and compensatory.

BY MR. WRIGHT:

Q. Now, to be sure we know exactly what you were replying to, the statement of Mr. Burns was the one that was offered in evidence and read to the jury just before your statement. That is correct, is it not?

A. That is correct.

11,641 Q. And the statement of Mr. Collingsworth, you recall, who he was?

A. He was affiliated with a truck line and I believe his carrier was a member of the Munitions Carriers Conference.

Q. Do you recall he was the General Traffic Manager of Strickland Transportation Company at Dallas, Texas?

A. I do not recollect that at this time. I know that he was a trucker and I know he was with the Munitions Carriers Conference.

Q. And then Mr. Jeans, do you recall who he was, what trucking company he was with?

A. Not at this time.

Q. You don't know whether he was the Tri-State -- Executive Vice President of Tri-State Warehousing and Distributing Company, at Joplin, Missouri?

A. He could be. I couldn't say with assurance.

Q. Do you recall who Mr. Hughes was?

A. I think that was Hughes Transfer or Hughes Freight Line. I cannot recollect that either.

Q. That, you think, may well have been the Mr. Hughes who was President of the Hughes Transportation Company of Charleston, South Carolina?

A. It could be, yes.

Q. And the last one there, Mr. Sam G. Tate, do you recall who he was?

A. Again, a trucker, and again a member of the Munitions Carriers Conference. To name the specific truck line, I cannot recall.

11,642 Q. Do you recall whether he was the Vice President and General Manager of Arrow Express Corporation of Chattanooga, Tennessee?

A. He could have been.

Q. I suppose those four carriers that submitted statements through Collinsworth, Jeans, Hughes and Tate, they were all, what you refer to in your statement here -- or what you claim to be -- specialized carriers of munitions?

A. This I cannot state that they were totally specialized. I don't know it.

Q. In your reference here to specialized carriers, you were referring to them, were you not?

A. I am referring, in my statement, to any carrier that specialized only in the hauling or specialized particularly in the hauling of Government traffic, to wit, ammunition and explosives.

Q. What I was referring to, Colonel, if you will look at page one of your statement, you make a reference to carriers that you say who "may consider themselves as 'specialized' operators," and you were referring there, I assume, to these carriers, were you not?

A. I am referring in my statement to any carrier that qualifies as being specialized and devoting himself more than anything else to the hauling of Government traffic and, specifically, ammunition and explosives.

11,643 Q. Well, you recall, do you, that the substance of the complaint that these carriers were making to the Commission was that the rate which had been put into effect, this rate that was just referred to here, which is 45 percent on 40,000 and 36 percent on the excess, in the same car, was a rate which had, in effect, eliminated them from the munitions business? Do you recall that?

A. I cannot state that that is so --

Q. You don't --

A. -- Or that was the substance of their complaint. Apparently they have lost tonnage or they would not be complaining, but I am in no position to state how much they lost or how much percentage that these particular carriers lost.

MR. WRIGHT: I will ask to have marked for identification the statements that have just been referred to.

I think -- do you have the number which was given to Mr. Burns' statement? These are all part of the same presentation and I thought we might give these A, B, C --

MR. SHEA: I just can't hear Mr. Wright.

MR. WRIGHT: I will ask to have marked 286, I believe, is the number that was given to Mr. Burns' statement and I will ask to have marked as 286A, the statement of Mr. Tate, Vice President and General Manager of the Arrow Express of Chattanooga.

11,644 THE DEPUTY CLERK: Plaintiff's Exhibit No. 286A.
(Statement of Mr. S. G. Tate marked as Plaintiff's Exhibit No. 286A.)

MR. WRIGHT: As 286B, the statement submitted on behalf of Mr. George Hughes, President of Hughes Transportation, Inc., at Charleston, South Carolina, and Mr. R. W. Collingsworth, or the statement by Mr. R. W. Collingsworth, General Traffic Manager, Strickland Transportation Co., Inc., I will ask to have marked as 286C.

And the statement by Mr. Rex Jeans, Executive Vice President, Tri-State Warehousing & Distributing Co., Joplin, Missouri, as 286D.

(Statement of George M. Hughes, R. W. Collingsworth, and C. Rex Jeans, marked respectively, as Plaintiff's Exhibit Nos. 286B, 286C, and 286D, for identification.)

MR. SHEA: If the Court please, does Mr. Wright have extra copies so that we may see what it is that he is --

* * *

11,645[1] THE COURT: Suppose you go on to something else while they read the exhibits.

BY MR. WRIGHT:

11,645 Q. Colonel Flanagan, what these gentlemen were replying to, and that you were replying to, had done, as you saw it was to suggest, was it not, that there was some dereliction of duty upon your part in accepting these quotations that you got from the railroads, is that correct?

A. Well, I am not quite at the disadvantage Mr. Shea is, but I would like to see those statements myself to refresh my memory if this is the kind of questioning you are going to pursue.

Q. No, you don't have any independent recollection?

A. I have some, yes, but if you are going to cross examine specifically on what is in those statements --

Q. Well, I just want to --

A. I want to see them.

Q. No, I didn't want to do that, of course, until you have had a chance to look at them.

You can't give me any -- forget about these statements -- about Mr. Burns' statement.

I gather from what you say from the statement here that is in evidence, you felt that there was certainly an implication in Mr. Burns' statement that you or the Defense Department had acted somehow improperly in accepting these quotations that you got from the railroads and that quotation I have just referred to.

A. That is correct -- not necessarily dereliction, but apparently Mr. Burns had challenged those rates as not being proper.

Q. Well, he had done more than that and what he had done was challenge your right to accept them, had he not?

11,646 A. Yes, he had.

Q. That is what you felt, and, of course, so far as you were concerned, it is perfectly clear you were bound, were you not, to use whatever the best rate available was at any time? There is no question about that, is there?

A. I didn't use the rates. I was not bound. I was bound to accept tenders, rate tenders.

Q. Well, that's what I mean, insofar as -- of course, your rate transactions, like those of anybody else in the Government, were subject to review by the Comptroller General or the General Accounting Office, were they not?

A. I didn't quite understand your question.

Q. I say, the Department of Defense submits the rates paid -- are subject to review by the General Accounting Office in the same way that any other Government transactions are. Isn't that right?

THE COURT: Wait a minute. Mr. Shea, do you object?

MR. SHEA: May I state the grounds?

THE COURT: State the grounds for your objection.

MR. SHEA: I have had a very considerable experience with the General Accounting Office and, as Your Honor knows, the jurisdiction of that office is a highly complicated matter.

Now, it has certain jurisdiction over -- in the way of auditing -- it's a question of whether it is pre-auditing, post-auditing, just how far that auditing goes -- involves, as Your Honor knows, very subtle questions of jurisdiction and very subtle questions of authority.

11,647 Now, I don't know whether Mr. Wright is asking this witness to explain or to make a judgment as to just what the jurisdiction of the General Accounting Office is, but that is the way the question --

THE COURT: Let me ask Mr. Wright. Was that implied in your question?

MR. WRIGHT: No. I wasn't trying to explore with Col. Flanagan, the jurisdiction, whatever it may be, of the General Accounting Office.

I was simply undertaking to establish what I though to be a fact, and I am sure the Colonel can correct me if I am wrong, that the Department of Defense, at least to your understanding, when it comes to selecting carriers for the transportation of commodities that it wants to move, is supposed to accept the best available tender in terms of rates and service.

THE COURT: Can you answer the question?

THE WITNESS: His question is slightly involved. I cannot speak, of course, for the General Accounting Office. All I can speak is the same thing that was stated from the stand before by General Lasher:

We are the Department of Defense. We are beholden to the taxpayers. We always use, or try to, the lowest cost transportation service that will meet the requirements needed.

11,648 Now, if the requirements are high, and you can't use the lowest cost, you have got to step up to meet your requirements, that is what you would do.

But the main theme, and this is certainly for the benefit of the taxpayers, is to use the lowest cost transportation that will fit our requirement and meet our needs.

BY MR. WRIGHT:

Q. And, certainly, if you hadn't done that, you might be subject, I suppose to some criticism by the General Accounting Office or the Comptroller General. Isn't that so?

MR. SHEA: If the Court please, I object on the grounds already stated.

THE COURT: Well, he can answer that question. You can answer that question.

THE WITNESS: I will try. In other words, what I think Mr. Wright says now, "Flanagan, if you were routing traffic, and you don't use the lowest cost service, then you are doing wrong."

My answer to that is that I did not route traffic.

BY MR. WRIGHT:

Q. Well, you are familiar, aren't you, Colonel, with the standards which were applied by the Defense Department in the routing of ammunition and explosives traffic?

A. Yes.

11,649 Q. Well, and the standard applied was to use whatever mode of transportation offered you the best service at the best rate, isn't that correct?

A. I have quoted before, and General Lasher, I believe, has made the statement, and I will repeat it and beg pardon for repetition, that the policy was to use the lowest cost carrier that could perform the required service.

Q. And that has been the policy of the Department for years, had it not, before you got there?

A. I cannot speak before my time.

Q. Well, at least during all the time you were in there, and insofar as you know before that?

A. As I understand it.

Q. That was not a policy initiated by you or General Lasher, I believe.

A. I was in no position to initiate policies, Mr. Wright.

Q. And, now, so far as Riss & Company is concerned, Riss & Company had never, at any time, complained to you or criticized you for accepting what you regarded as the lowest rate tender by the carriers for ammunition shipments?

A. I can't speak on that. I don't know whether Riss criticized me or not.

Q. To your knowledge, did anyone -- did Riss & Company or any representative of Riss & Company ever tell you that you were wrong in accepting or using the quotations for the shipment of ammunitions and explosives which were the lowest available quotations?

11,650 A. Not to me, personally, to the best of my recollection, but I cannot speak for what Riss & Company did in other circles or otherwise.

Q. I am asking you about your knowledge. You undertook to make some statements about Congressional complaints.

Were you ever asked to respond to any complaint by any Congressman that related to Riss & Company traffic?

A. I do not recollect specifically, Munitions Carriers Conference, yes.

Q. I am not talking about the Munitions Carriers Conference. I am talking about Riss & Company.

A. Then my answer must be to you that I cannot recollect, personally.

Q. Well, you would know, wouldn't you, if it had happened? It would come to your attention, wouldn't it?

A. I was criticized so much during that time, Mr. Wright, that it is difficult for me to remember. We are talking many years back now.

To the best of my recollection, no.

Q. Now, at that time, Colonel, at the time you made this statement in reply, and at the time these gentlemen that you refer to in your statement, made their statements, this suit was on file, wasn't it?

11,651 THE WITNESS: (To the Reporter.) Would you mind this time, the question is quite lengthy, would you mind reading that question back to me, please?

(Whereupon, the pending question was read by the reporter.)

MR. SHEA: Your Honor, I object.

THE COURT: Do you object to that?

MR. SHEA: On the grounds that he ought to find out first, whether Col. Flanagan knows and --

THE COURT: I was just getting ready to ask that question.

Do you know, Colonel, whether or not this suit was on file at that time?

THE WITNESS: I can't quite understand Mr. Wright's question.

THE COURT: Suppose you reframe the question.

BY MR. WRIGHT:

Q. Were you ever told about the filing of this suit?

THE COURT: By Riss & Company.

MR. WRIGHT: This one.

THE WITNESS: You mean by Riss & Company?

THE COURT: The one we are trying now.

THE WITNESS: That Riss & Company told me?

BY MR. WRIGHT:

11,652 Q. Anybody. When did you first -- if you did learn about it -- when did you first learn about it?

A. I knew of the suit. But I can't recollect when I first knew of it.

Q. Well, would it help you if I tell you that the suit was filed in September, 1954?

A. I can't recollect the date that I knew the suit existed, no, I can't.

Q. Well, do you know now what the substance of the charge was that was made in that complaint in 1954?

A. Not entirely. I haven't been here at the start of the Court, the opening, of course, and I haven't heard the testimony.

I can't speak with any authority on this thing.

Q. You weren't aware of the fact that the suit charges the railroads --

THE COURT: Wait a minute.

MR. AILES: If Your Honor please, I don't believe counsel should get on to the complaint now. That is not --

THE COURT: Well, I don't know the purpose of the cross examination.

Suppose you approach the Bench, and then we can discuss it.

MR. WRIGHT: I will be happy to state it -- the purpose now, Your Honor, and we won't need to approach the Bench.

11,653 THE COURT: No, come to the Bench.

(Whereupon, counsel approached the Bench and the following took place:)

MR. WRIGHT: The purpose is to show that a complete and deliberate misuse is being made of this statement -- that this statement was not made or authorized to be made for the purpose of contradicting any assertion or claim made in this suit.

THE COURT: Just a minute.

MR. WRIGHT: That this statement in Ex Parte 206 was not made by Col. Flanagan or authorized to be made by him for the purpose of contradicting any --

MR. AILES: Your Honor --

THE COURT: Wait a minute. One at a time, now.

MR. WRIGHT: -- For use in this suit at all and that Mr. Shea and the defendant's counsel, all know that prior to the time that these statements were made by the Munitions Carriers Conference to which Col. Flanagan was replying, Riss & Company had pointed out to Mr. Burns that it had in this Court this suit, and had taken a position which was in direct contradiction to the one that he and these other carriers proposed to take in Ex Parte 206.

And that as a result of that, Riss & Company tendered its resignation from the Conference before that date.

11,654 Now, it is perfectly clear, if you read Colonel Flanagan's statement, that there is no contradiction at all between the position he took in 206 and the position that Riss & Company takes in this case and has always taken in this case in two respects:

1. We say, as he did, that the Commission had no jurisdiction whatsoever to do what the Munitions Carriers Conference and these other four truckers were asking them to do, to wit, establish a minimum level of Section 22 rates or do anything else about these munitions rates.

2. That it is a fact that Riss' position has always been that there was nothing improper whatsoever in the Colonel's -- anything Col. Flanagan did, the Department of Defense did, or anybody else who used the lowest available -- the best available rate for routing traffic --

And that what has been done here is an attempt to line up the military branch of the Government on the side of the railroads in this case by resort to this statement, which was submitted in a wholly different case for an entirely different purpose.

And it is, I think it quite improper. By the time I get through, I think your Honor will strike this -- certainly parts of this statement from this record.

THE COURT: You want to show that the position that your client, Riss & Company, took was not consistent with the position that the Munitions Carriers Conference --

11,655 MR. WRIGHT: Oh, it's entirely inconsistent --

THE COURT: Inconsistent --

MR. WRIGHT: They broke over this precise issue -

THE COURT: I will hear the objection now.

MR. AILES: He can't show that from this witness, anyway, who obviously knows nothing about what position Riss & Company took.

MR. WRIGHT: That's what --

THE COURT: Wait a minute.

MR. AILES: The basis of my objection is that as Mr. Wright knows, you do not in this jurisdiction hand your complaint to the jury. You can't stand up and say what your complaint says in front of the jury.

That would be very serious error.

THE COURT: Do you propose to do that?

MR. WRIGHT: No.

MR. AILES: Your Honor --

THE COURT: Wait a minute. One at a time.

MR. WRIGHT: I don't propose to hand the complaint to anyone. I propose to show what I believe the fact to be, that Col. Flanagan did know about this suit and if he understands what the issues in this suit are, he knows that the position we have taken in this suit and have consistently maintained is directly contrary to the position that he was replying, to that the

Munitions Carriers Conference and that these four other carriers took in Ex Parte 206.

11,656 Now, that's what I propose to show.

THE COURT: All right. Let me hear Mr. Ailes now.

MR. AILES: Your Honor, the question I objected to is, "Don't you know what the complaint in this case charged?"

He said "No." And at this point, Mr. Wright began to recite what the complaint in this case charges.

At that point, I got up and said, "Your Honor, I don't think it is proper for counsel to go down his complaint before the jury.

You said, "Come to the Bench".

Now, Mr. Wright says he wasn't planning to say anything about his complaint or using his complaint.

That's the sole basis on which I got up. But when I come up here and listen to what Mr. Wright is trying to prove with this witness, it seems to be perfectly plain that this whole line of inquiry is improper.

He may have some argument he wants to make at some time, but he can't prove it by this witness, just by sitting here and reciting facts and saying, "Weren't you aware of that?"

This witness doesn't know anything about what Riss & Company was doing. That hasn't been established. This witness didn't know when the suit was brought.

11,657 MR. WRIGHT: Now, this witness --

THE COURT: Wait a minute.

MR. AILES: The material is --

THE COURT: Wait a minute, please, Mr. Wright.

MR. AILES: This material, this statement is in the record for whatever it is worth. If he wants to make an argument about it later, the statement that prompted it, the Burns business, is in the record. This is the reply to it.

Now, those two things stand alone. If he wants to argue that this is not inconsistent with Riss' position, that's an argument. But he can't --

MR. WRIGHT: Your Honor --

THE COURT: Wait a minute, Mr. Wright. I have already summarized in a brief way for the jury, what the allegations are in the complaint, which includes the supplemental paragraph 18.

Now, I don't propose to let you go, unless you can show me some reason why you should, into great detail as to all the allegations in the complaint.

MR. WRIGHT: I don't want to go --

THE COURT: I don't know why that is necessary.

MR. WRIGHT: I just --

THE COURT: Mr. Ailes.

MR. AILES: I think he should ask him if this suit, "Did you know that this suit was pending at the time you made this statement?" If he says "NO," that is the end of that.

11,658 THE COURT: Well, now, the way it looks to me at this posture of the evidence, is the jury might conclude that Riss & Company, the plaintiff, was a party to the position taken by the Munitions Carriers. That's your position, is it?

MR. WRIGHT: Yes.

THE COURT: And you --

MR. WRIGHT: And --

THE COURT: Wait a minute --

MR. WRIGHT: It is perfectly clear from the position we took in this suit that we couldn't possibly have subscribed to that position.

THE COURT: All right. At any rate, you have got your objection. Now, do you want to make a objection, Mr. Shea, for the record?

MR. SHEA: Let me say this, Your Honor. In the first place, it is entirely clear that the issue is presented as to whether or not -- and it is highly relevant as to whether or not there was pressure on the part of the Army to put in this rate, whether this was proposed, etc., and all of this testimony is highly relevant on this point.

Now, I do not know what the facts are myself, as to Riss' relations with the Munitions Carriers Conference.

I just tell you that as an officer of the Court.

11,659 I don't know that, I have heard that Riss is the kind of a fellow that isn't much for organization -- whether this is the case or not, I don't know.

I think -- this is the kind of talk I have heard and about what I think I know.

The fact of the matter is that Riss has taken quite an inconsistent position contemporaneously in this law suit and in the Fruehauf case, so that the fact that the positions are inconsistent, does not prove to me that Riss is incapable of taking different positions in different proceedings.

Now, whether he was at that time, at the time this statement was made, a member of the Munitions Carriers Conference, I don't know. Mr. Wright says he wasn't. I assume Mr. Wright knows the facts.

MR. WRIGHT: There is a series --

THE COURT: Wait a minute.

MR. WRIGHT: -- of correspondence --

THE COURT: Just a minute.

MR. WRIGHT: -- Which was all turned over to the defendants --

MR. SHEA: Your Honor --

THE COURT: One at a time.

MR. WRIGHT: -- In discovery proceedings.

11,660 THE COURT: Just one at a time. Let Mr. Shea finish.

MR. SHEA: Now, Your Honor, I don't know whether you have been able to read all of the exhibits even, that have been put in this case, but I can tell you the pieces of paper that have been turned over are 50 times that number. I assure you I have not read every item.

THE COURT: Well, here is the way I feel about this. Now, I am ready to rule. Here is my opinion:

I have given the defendants a great deal of latitude in connection with their examination of Col. Lasher and Col. Flanagan.

I think the jury is entitled to all of the facts that have any bearing at all. I think they are entitled to it. I can't see any harm will be done by asking the question.

MR. AILES: Your Honor, is Mr. Wright going to be permitted to say what his complaint says before the jury?

THE COURT: Well, I don't know how far he expects to go.

MR. AILES: I would like to urge that that not be --

THE COURT: I don't think you ought to go any farther than what I stated in my opening remarks to the jury.

At that time there wasn't any rate challenge.

MR. WRIGHT: I can give you the substance of the question. I would say, "Don't you know --

11,661 THE COURT: Suppose you put in the record what you expect to ask.

MR. WRIGHT: "Don't you know as a fact, Colonel, that this suit, the charge that was made in this suit, was that there was a conspiracy among the railroads to monopolize the business of transporting ammunition and explosives for the United States Government?"

THE COURT: Well, you can ask him that. Everybody knows that. There isn't any secret about it. I mean, it is in the complaint.

MR. WRIGHT: I didn't suppose there was -- that this was a matter that would properly be kept from the jury at any time.

THE COURT: Didn't the complaint in effect, or substance, charge that?

MR. AILES: I am sure the complaint charged that, but my point is that the complaint isn't in evidence and isn't supposed to be put before the jury.

THE COURT: Well, now, opening statement has been made about what the complaint charges. I have gone into detail with the consent of counsel; when I prepared the opening charge to the jury, I tried to summarize what the issues were. I can't see any harm in --

MR. AILES: Well, I would like to suggest that the key question here is, "Didn't he know at the time he testified in this case that this was so?"

11,662 THE COURT: All right. Your record is protected. Let's proceed.

MR. SHEA: Your Honor, I am having difficulty in reading the record and keeping track of Mr. Wright. I will try to read them --

THE COURT: All right.

MR. SHEA: -- And the Colonel ought to have a chance to read them.

THE COURT: We should have had extra copies of those. All right. Let's proceed and do the best we can.

(Whereupon, counsel went back to their tables and the trial proceeded in open court.)

THE COURT: You had better propound the question again to the witness.

BY MR. WRIGHT:

Q. Colonel, if I understood you correctly, you say you did know about the filing of this suit prior to the time that you made this statement in Ex Parte 206?

THE COURT: Just a minute, please.

MR. SHEA: Your Honor, the Colonel did not so testify. He only testified that he knew at some time and could not place the time when he came to know.

THE COURT: When did you know about the suit, Colonel? Do you know approximately?

THE WITNESS: I don't really know, Your Honor.

THE COURT: You did hear about it?

THE WITNESS: I did hear about it, the suit, but I can't place the date.

BY MR. WRIGHT:

Q. You can't tell us, as you put it, whether you heard about it in 1955 or 1956, or 1957? Is that correct?

A. I cannot say, no, sir.

Q. So that, then, it is quite clear, is it not, that at the time you prepared this statement that is in evidence there, for use in the Ex Parte 206 proceeding, you were not in any sense responding to any charge made in

the suit here, were you?

A. I am not a party to this suit.

11,664 THE COURT: Let me ask you: When you made the statement about Ex Parte 206, was it --

THE WITNESS: Yes, sir.

THE COURT: Were you in any way responding to the so-called charges or allegations that were made by the Riss & Company in the present case or the suit?

THE WITNESS: The answer would be in the negative.

BY MR. WRIGHT:

Q. It is perfectly clear, in so far as that statement in Ex Parte 206, that Mr. Shea has offered in evidence through you, that that statement was not prepared for use in this suit or was not authorized by the Department of Defense for use in this suit, was it?

A. I would say it was not prepared for this suit; whether it is authorized by the department of defense for use in this case or not, I cannot say. I cannot speak for the Department of Defense.

Q. Well, at the time it was prepared, the statements you have in there were authorized solely for the purpose of replying to what those particular men had said in Ex Parte 206, isn't that correct?

A. I don't think - I just got through testifying to that effect. I think you testified to the effect, of course a primary purpose of this statement was in reply, to Mr. Burns' statement. But, also that we were using this as a vehicle to show that what we had sought and what we had obtained was reasonable, compensatory, proper and right.

11,665 Q. The primary purpose of your statement I gather was to show

that what you and what the Defense Department had done in this connection was perfectly proper. Isn't that so?

A. That is one of the reasons, yes.

Q. Well, was there any other reason?

A. The answer to Burns' statement, the other reason, the reason also to show that commercial shippers were often getting movements of their commodities at prices below what the Government was obtaining, and revenues less to the carrier.

Q. Of course the purpose is to show all the facts that you have in there. But I am directing your attention to the particular issues, as I understood them in that proceeding, and those that are here.

Now, as a matter of fact, Colonel, did you know that the position you took in that statement with respect to the jurisdiction of the Interstate Commerce Commission is precisely the same as that taken by the plaintiff in this case, Riss & Company?

A. I could not answer on that, I do not believe.

Q. Well, you know what your own position was, do you not?

11,666 A. I know what my position was.

Q. That the Interstate Commerce Commission had no jurisdiction to do anything about these rate cuts that the railroads had put into effect; isn't that correct?

A. When you say --

MR. SHEA: If the Court please --

THE COURT: Do you object?

THE SHEA: I object on the grounds that the statement speaks for itself. So far as I can recall, there is no statement in it questioning the jurisdiction of the Interstate Commerce Commission.

THE COURT: I will overrule it. I will permit the cross examination.

THE WITNESS: There is a great deal of diversified opinion. Whether the Interstate Commerce Commission has or has not jurisdiction, our position was taken here that the Interstate Commerce Commission did not have jurisdiction over our rates. The statement goes well beyond that, though, and attempts to prove without a reasonable doubt that what we sought was right and compensatory and proper.

BY MR. WRIGHT:

Q. Well, I am referring, Colonel, to your point "B" on the first page of your statement where you say that the physical relief sought by the Munitions Carriers Conference, Inc. is beyond the jurisdiction of this Commission to grant.

11,667 A. That is the position.

Q. That statement of yours I take it referred to the request of these carriers that the Commission place some kind of a floor under Section 22 rates on ammunition and explosives, is that right?

A. The position in this statement is that the Interstate Commerce Commission did not have jurisdiction over those rates. That is the position taken.

Q. And they could not place a floor under those rates.

A. That is our position here.

Q. Your position was that the level of rates on ammunition and explosives ought to be determined by normal competition, isn't that correct?

A. Not quite, sir. First, we state that the Commission, we do not believe, has jurisdiction over the rates. Then we present the rates that we have, and which we negotiated for, and compare them as best we can to

conclusively prove that what we sought was right, proper and compensatory.

Q. Now, in connection with that matter of what you had done, actually when you had suggested to the railroads that their rates on ammunition and explosives were unreasonably high, you had not done anything that your predecessors had not done, had you?

11,668 A. I cannot speak for my predecessors.

Q. Well, don't you know, Colonel, as a matter of fact, that ever since the Reparations case has been filed in 1947, the Department of Defense had been complaining that the railroad rates on ammunition and explosives were unreasonably high.

A. I know in my own conviction, in my time of tenure, I thought they were unreasonably high -- entirely too high.

Q. You were not aware of the existence and pendency of the Reparations case?

A. In a general way.

Q. Well, you knew, did you not, that the Reparations case had been filed back in 1947 and that the burden of the Government's complaint in that case was that these rates were too high, did you not?

MR. BALL: If the Court please, these rates, if we are speaking of the rates that are under attack, that is one thing.

THE COURT: What do you mean by "these rates"?

MR. WRIGHT: The rates charged to the Government by the railroads for carrying ammunition and explosives.

MR. BALL: In what year?

THE COURT: Which years do you refer to? Between 1947 and the end of the Reparations hearing.

11,669 BY MR. WRIGHT:

Q. The reparations case having been filed in 1947, I presume necessarily would refer to prior years, would it not?

A. It is my general understanding. I cannot speak with detail on the Reparations cases. It was handled by the Department of Justice. I did not participate in those proceedings. It is my understanding that among other things the Reparations case, would say the rates on ammunition and explosives put in and maintained by the rail carriers were unreasonably high. This is my general understanding.

Q. And that was really common knowledge, was it not, for years that the Department of Defense had consistently taken the position that the rail carriers' rates were unreasonably high?

A. I cannot speak for what the Department of Defense thought, or what they did.

Q. All the time you were there that was true, was it not?

A. At the time of tenure in my office, the Department of Defense definitely was that the rates were unreasonably high.

Q. They did not hesitate to communicate that thinking to the railroads, did they?

A. Well, now again, you ask me to speak for Mr. Earl Smith, and the Department of Defense. I cannot speak for them. I am probably sure they did think that of the rail carriers.

11,670 Q. When was the first time you suggested to the railroads that their rates on ammunition and explosives were unreasonably high?

A. A precise time?

Q. Approximately.

A. I can't give you any precise time. I can state this much: When I took over the job and the task of rate negotiation efforts, the very first thing that my superiors got on me for and told me was important and to get going on was to establish reasonable rates with the rail carriers for the hauling of ammunition: That this study had been going on for some time, it was the responsibility of mine, and I had better get with it.

THE COURT: Excuse me. When did you say you first took your job?

THE WITNESS: In about 1953, in October.

Now, I, of course, was not familiar with all of the facets of the thing at this time. The study did pursue; and was pursued under my jurisdiction, and was finally presented to the rail carriers in 1955, at various times, as General Lasher has testified.

BY MR. WRIGHT:

Q. Colonel, it is a fact, is it not, that in 1954 you also advised the railroads when the opportunity was presented, that you thought their rates were unreasonably high, didn't you?

11,671 A. I cannot recall specific occasions: I knew as the study progressed and I became more familiar with the background that had been developed, that I became very much convinced myself, and positive, that the rates were too high. This I can say, yes.

Q. And it really was part of your job, was it not, at the point where you thought any carrier was charging the government unreasonably high rates for traffic that was under your jurisdiction, that you would not hesitate to tell them so, would you?

A. This is not so. The job I had as rate negotiations, there was laid down policy for the method of operation. We were to operate as much as we possibly could, not in the acceptance of what a carrier wanted to give us, but what we went and asked for, to do it as much as would be proper and right to present a case that would be reasonable and to not say "Give us the cheapest rate you have got." But to say "We think your rate is wrong, we think it is too high, we think it is too high for the factors of rate-making." And these are the reasons why. "Please establish this specific rate that we ask for."

Furthermore, I could not initiate any negotiations with anyone for movements, as I recall, a thousand tons or more, without approval of the Department of Defense. I could negotiate for lesser movements and after the termination of those negotiations they were subject to review by the Department of Defense: and if they were not right, I assume that I would probably have been criticized.

11,672 Q. Let me put it this way to you, Colonel: When you and General Lasher presented these proposals that you made to the various rate associations in the spring of 1955, you were not bringing any news, were you, to any of the railroads in so far as you were disclosing to them the fact that the Department of Defense thought their rates on ammunition and explosives were too high?

A. Again your question is quite involved. Would you re-read that question, please?

THE COURT: Read the question.

(The reporter read the question.)

THE WITNESS: I would have to say I do not think I was bringing news that we thought their rates were too high. But again I cannot speak for past history and I can't speak for the Department of Defense, and I can't speak for the Reparations Cases.

BY MR. WRIGHT:

Q. Now, getting back to these comparisons that are in your appendix "A" on your sheet 1 there.

11,673 A. Sheet 1, sir.

Q. Do you have that in front of you?

A. I believe so, sir.

Q. Is that first destination, Oregon-Butte Montana, is that correct?

A. Yes, sir.

Q. And you have under military Section 22 rates there a figure representing revenue per car at $1279?

A. Yes, sir, under column --

Q. It was supposed to represent what the car would produce in revenue if the rate of 44 per cent of First Class were applied to it, is that right?

A. On the docket 28-300 scale.

Q. Now, as a matter of fact, no carrier up to that point at least had ever given you a section 22 quotation for the shipment of ammunition or explosives from Trojan Oregon to Butte, Montana, which had a rate of 40 per cent, had they?

A. I do not recall one. It could have. I do not think we had moved much from Trojan, Oregon to Butte.

Q. Don't you know, as a matter of fact, Colonel, that the railroads up to that point had never reduced the rates on their Section 22 tenders to the army below 55 per cent?

THE COURT: Do you object?

11,674 MR. SHEA: If the Court please, has Mr. Wright indicated what point he is talking about?

THE COURT: What is that?

MR. SHEA: Has Mr. Wright indicated what point he is talking about.

THE COURT: What point? Have you indicated that?

MR. WRIGHT: Yes, the points I am talking about are those stated in the schedule, Point of origin is, I think, Trojan, Oregon and the destination is Butte, Montana.

MR. SHEA: May we hear the question again?

MR. BALL: I object to the question because Mr. Wright has put into evidence a document which gives a large number of Section 22 quotations by the railroads which were substantially below the figures, and many of them are in this territory. So, his question is contrary, assumes facts contrary to his own exhibit that he has introduced.

THE COURT: I will let the witness answer. Do you remember the question?

THE WITNESS: Read it again, please.

THE COURT: Read the question.

(The reporter read the question.)

THE WITNESS: I do not know.

MR. BALL: If the Court please, may I approach?

11,675 THE COURT: Yes.

(At the Bench.)

MR. BALL: If the Court please, I say one of the essential elements in cross examination, that when the party puts into evidence facts he is not going to be able to cross examine the witness by making assumptions contrary to those facts.

THE COURT: What do you claim are the facts?

MR. BALL: The facts in this document, that he put in from our file, showing our study of Section 22 rate quotations.

THE COURT: The one he is cross-examining about now?

MR. BALL: No, he put in his case in chief a long document which we compiled, showing specific -- made by the defendant railroads, including a large number in this territory, substantially below the Section 65. That a plaintiff's exhibit.

When he makes this statement he is making an assumption absolutely contrary.

MR. WRIGHT: If there is any claim that you put in a section 22 quotation for a rate below 55 per cent from Trojan, Oregon, to Butte, Montana, I should be very glad to call the witness attention to that.

THE COURT: One at a time. I can't permit this argument.

11,676 MR. WRIGHT: That is what I was asking him about.

THE COURT: Now, first of all, are you contending, Mr. Wright -- let me get this straight in the record, that there is evidence in the record to show or that supports the assumption you make in your question.

MR. WRIGHT: Yes. Let me review what I think the evidence is.

THE COURT: All right.

MR. WRIGHT: As far as the general reduction is concerned, it is perfectly clear and indisputed on this record that there was no -- they never did meet the army proposal for a general reduction.

THE COURT: What do you mean by "they?" The railroads.

MR. WRIGHT: In that area west of the Blue Line, and north, which is exactly where Montana and Oregon are.

THE COURT: Do you agree with that?

MR. BALL: I agree with that.

MR. WRIGHT: Now, it is also true that we put into evidence particular point-to-point quotations which were made both before and after the general cuts. I do not believe that any of those quotations apply to this particular pair of points. If one did, I should be very happy to withdraw my question.

11,677 MR. BALL: The question did not relate to the point-to-point in this particular place. I do not know whether there is one between these points. But he said "You know, don't you, that there is in this territory the railroads--the tender to the railroads is under 55" -- read your question.

MR. WRIGHT: Let us get the question read here.

THE COURT: Wait a minute.

MR. WRIGHT: Let us see what the question is.

THE COURT: Don't argue this thing. Just one at a time now. Let us find out if the lady can read the question.

(The reporter read the pending question.)

MR. WRIGHT: If I ask it as he says, I was clearly wrong. I believe I asked it point to point.

THE COURT: Reframe the question, please.

MR. WHEELER: I have an objection, if it is limited to these two points. I can see no earthly reason, any materiality, any issue in this proceeding, as to whether or not there is a Section 22 quotation between this point in Washington or Oregon and Butte, Montana.

Now, I happen to know, having been born and formerly a resident of Butte, Montana, that there is no military installation of any kind or

character in Butte, Montana. What in the world good is it going to do to clutter this record up with the statement that the Government does not ask for quotations between those two points? I just do not understand it.

11,678 THE COURT: Are you going to reframe the question?

MR. WRIGHT: Yes.

(In open court.)

BY MR. WRIGHT:

Q. Colonel, you recall, do you not, that there were some areas of the country where the railroads did not put into effect at any time, at least prior to the time you gave this testimony here, the general reduction that you requested?

A. What I recall -- my branch received somewhere around 20,000 or better quotations a year -- yes, there were point-to-point reductions made by both modes of carriers: Bot the truckers -- just the best I can testify, Mr. Wright.

Q. I am not directing your attention --

MR. AILES: Did this witness answer the question?

THE COURT: Wait a minute. Let us proceed now.

BY MR. WRIGHT:

Q. I understand that you might have point-to-point reductions in any territory at any time. There is nothing to prevent, any railroad might give you a section 22 quotation from point-to-point, that might be well below any general quotation?

11,679 A. Well, the trucks and the rail carriers.

Q. But what I am directing your attention to is the response that the railroads made to the proposal that you and General Lasher made

to them for a general rate reduction which would give the army the benefit, the Defense Department the benefit of a rate as low as 40 per cent, if you had a carload of more than 80,000 pounds?

A. What time frame are you talking about?

Q. I am talking about the time preceding the statement you made in ex parte 206, that you have in front of you.

A. Well, the best of my recollection, this statement was made in the springtime of 1957. It appears to me that rates were established on blanket-wide basis on territory. Certainly in October or thereabouts of 55, via Eastern carriers, and subsequently by the Western and Southern carriers, in the springtime of 1956.

Q. Now, the rates that you are talking about there, the rates in October, 1956 by the Eastern carriers, those rates were confined to Eastern territory, were they not?

A. Your question ---

THE COURT: You said 1956.

THE WITNESS: I did say 1956.

11,680 THE COURT: Reframe the question.

BY MR. WRIGHT:

Q. I say the rates that the Eastern carriers gave you, the response they made to your request for a general reduction in October, 1955, that did give you this 45-36 per cent rate in the Eastern territory, within the east, isn't that right?

A. Yes, it gave us the 45 per cent and 80 per cent of the 45 on 40,000 pounds.

Q. And do you recall at that time the Western, in the Western territories, the rate did not go below 55 per cent, did it?

A. As I can recall that, the east made the adjustment. The west made a slight reduction to 55 per cent, which we did not consider responsive. The South did nothing.

Q. Yes.

A. As I recall.

Q. Now, along in the spring of 1956, in the Western territory and between East and West, I want to direct your attention to that exhibit 2 there, the Western territory that is east of the blue line you see drawn in the Western part of the country there -- that was where the rate was then brought down also to this 45 per cent - 56 per cent basis by Western carriers, isn't that right?

11,681 A. What specific territory are you speaking of? All of the territory west of here (indicating map.)

Q. I am talking about the territory that is east of the heavy blue line that is drawn through, just below Montana there, through New Mexico, and Colorado, that is the line I am referring to, Colonel, yes.

A. Well, of course, I can't state without checking and having tariffs checked. If you mean to infer that this roughly blocks out Montain Pacific territory, then I can say roughly that adjustment was not made in Mountain Pacific Territory.

Q. That is what I was getting at, that was Mountain Pacific Territory was excluded from those general reductions that were made in the spring of 1956 by the Western roads, isn't that right?

A. That is correct, sir.

Q. So it is a fact, is it not, that at the time you were giving this testimony in ex parte 206 and prepared these tables that you have attached, there had been no general reduction in that area below 55 per cent of first class, is that right?

A. Do you mean blanket adjustment?

Q. Yes.

A. No.

Q. There had been no response to your proposal?

11,682 A. You are correct, there was no blanket adjustment for that territory, to the best of my knowledge below 55, point to point without a doubt.

Q. Now, calling your attention to point-to-point rates, do you know, Colonel, whether or not you had, prior to the time you made this statement, actually received any point-to-point section 22 quotation between these points you have listed here, Trojan, Oregon, from Trojan, Oregon to Butte, Montana, and a rate of 40 per cent of first class or any other rate?

A. I don't recall receiving any. I would not expect to receive anything between Trojan and Butte. I do not think there would be any of our traffic moving between those two points.

Q. So that so far as what you have there is a purely theoretical calculation, that had no relation, did it, to any traffic that had actually moved under section 22 quotations, is that right?

A. I do not think so. This statement is to compare how the rails treated the commercial shipper, what rate levels they established, where there was movement of commercial explosives. That is what this purports to show. It purports to further show that if they establish the rates we asked for, they receive a great deal more money, more compensation, more compensatory than they would for the rates they establish for the commercial shipper. That is what it purports to show.

11,683 THE COURT: Let me ask you a question: What do you mean by a commercial shipper, in connection with ammunition?

THE WITNESS: This is what I mean, sir.

THE COURT: Explain it to the jury, unless they already know.

THE WITNESS: I will try to do it to the best of my ability.

THE COURT: I am not clear about the commodities. I am talking about the commercial shippers.

THE WITNESS: Pardon me if I harangued a little bit. I will try to be as brief as possible.

First, there is a basic rate structure -- and I am speaking generally -- in the country. It is called class rates. It is provided so that no matter where a carrier goes and the points he serves, there is a rate in effect. You can look up in a book and get the so-called classification of the commodity, then you can find out what class rate it bears, then you can get the class rate and you know what your charges are.

Carriers are required to publish rates to and from all of the points they serve. Now, these are often called paper rates, as well as class rates. They move little or no traffic. The rates that move traffic are called commodity rates. These rates apply specifically from points to points, or from good hunks of one territory to another. They are generally put in to serve a commercial shipper who has a good volume of traffic between those points. They are sometimes even put in to encourage the growth of that shipper, to make more traffic for a line serving that shipper.

For example, we will state that you were going to establish a manufacturing concern of furniture in the area of Los Angeles, California, and you are going to reach for the market east of the Rocky Mountains, we will say around Denver and past. There has been no manufacturing particularly out there before, you would be faced with class rates. You could not afford to operate that way and you would seek commodity rates from carriers from the point of production to your market, and they would establish these rates,

generally speaking -- not always, sometimes, yes -- a commodity basis, so they can get your traffic and so that you can compete.

These which I speak of between these points were where commercial explosives did move, and they are commodity rates to move that traffic.

THE COURT: All right. Let us proceed.

BY MR. WRIGHT:

Q. Well, let us get back, if we can, Colonel, to rates and military explosives traffic.

11,685 A. Yes, sir.

Q. If I understand you correctly now, you say that you doubt if there were any military movements at all from Trojan, Oregon to Butte, Montana, at any rate, is that correct?

A. I rather doubt that there were. I do not know of any traffic offhand. I cannot say. Traffic moves anywhere in the military. But I do not recall any between Trojan and Butte to my knowledge.

Q. And how about the figures you have in the commercial commodity rate column there? Did those car figures also purport to show any reflection of what happened in connection with any actual movement? Or is this just a computation made on what you referred to as a paper rate?

A. These are published tariff commodity rates. I am sure the carriers did not have them published as commodity rates and tariff at those points unless traffic were moving. Of course, I cannot speak of how much traffic flows from Trojan to Butte. I know there is a powder outfit at Trojan, of fairly good size, if I remember right. I am sure they have traffic in the mining area.

Q. You assumed for the purpose of your computation there, that the minimum weight that was specified in the tariff actually represented 11,686 ... the weight that moved, did you not?

A. This is all the wait the shipper was required to load to get this rate, was 20,000.

Q. Well, your own experience tells you that the mere fact that the minimum is 20,000 does not mean that the shipment will be 20,000, the car, I gather used for these commercial shipments is just as big as the car that is used for the military shipments, right?

A. Correct. There should not be any difference in the size of the car. But I am sure that if the shipper was loading 40,000 pounds, speaking as a rate man, I would ask for a lower rate and ask for the 40,000 pound minimum.

Q. In your own experience you have been loading 87,000 pounds average for years in the military, have you not?

A. That was our average. I would not say for years.

MR. SHEA: Let him finish his answer. Mr. Wright is constantly cutting him off.

THE COURT: I will caution counsel again. You may finish your answer.

THE WITNESS: Will you read the question now, please.

BY MR. WRIGHT:

Q. Those 87,000 --

11,687 THE WITNESS: I asked for the question to be re-read.

THE COURT: Let's have it read. Have the reporter read the question.

(The reporter read the question and the answer.)

THE WITNESS: I cannot speak for the definite years from recollection and name a specific year. That was the average we were loading at the time we went to the rate adjustment.

BY MR. WRIGHT:

Q. And it was actually the average that you had been loading was very close to that, was it not, during World War II?

A. That again I cannot speak with authority. I was not connected in this arrangement during World War II. All I can speak generally is that both shippers -- all shippers, military and commercial, during World War II were encouraged to load as heavily as possible, regardless of any commodity shipped, to preserve what little transportation we had available. I am sure the military did load as heavily as they possibly could on any unit that they shipped.

Q. And they had been loading as heavily as they could on the 50,000 pound minimum, had they not?

A. What?

11,688 Q. At the time when the rate was 65 per cent of first class, 50,000 pounds minimum, I say the military had been loading the cars as heavily as they could regardless of the fact that you only had to load 50,000 pounds to get the 65 per cent rate?

A. I could not speak for those years. It would be my assumption, it being the military policy during the wartime to load as heavily as possible, if you are talking of wartime traffic, yes. I think you mean 65, do you not, of the wartime rate?

Q. I said 65 per cent of 50 was the prior rate.

A. Yes.

Q. When you had a rate of 65 per cent of the 50,000 minimum in effect, the military was loading an average of, you said, 87,000 pounds per car for 1953 and 1954, is that right?

A. I can't recall the precise years. I would have to look.

Q. If you look at your own presentation I think you will find those figures there?

A. It sounds about right.

Q. So that on the basis of your own experience it was quite clear to you that when it came to military traffic the minimum figure in the quotation did not bear any relation at all to the amount that was actually going to be loaded in the car?

11,689 A. I think that it does, Mr. Wright, this is why I think so: During the wartime effort it is not difficult, particularly in the military, to establish something you do and will do. During peacetime, while the military are controlled, they are like people and they are like businesses and they sometimes differ among themselves. People that load the car mostly are storage and distribution activities, or a depot, but not a transportation corps, necessarily, it might be the Quartermaster. They are more concerned about the labor and the cost that they have got to go through to load that car than the transportation Corps is concerned about getting the use of weights up and loading more in a car. Unless you can show an incentive, and show that it is for the benefit of the government to continue to do so, without a doubt your loadings will probably drop to where it can meet the rate and price, and it is not too difficult or costly for the loading service to do it.

Q. When you have a freight carrier that loads 100,000 pounds, and you have got 80,000 or 90,000 pounds to ship, you are going to put it in

one car, if you can, are you not, whether the minimum is 50,000 or regardless of what the minimum is, if you can get a favorable rate by using 50,000 pounds, you load at least 50 and as much more as you have to move that the car will hold, right?

11,690 A. I cannot answer your question yes or no. If you could load conveniently, undoubtedly you would. You would load it all in the car.

MR. SHEA: Let him finish his answer.

THE COURT: Let him finish.

THE WITNESS: If it was going to cost considerably extra labor, I know this much as a transportation officer at the local place and it was going to cost considerable money to load it all in the same car, and I could move two cars, it would be my business to do it, at 40,000 pounds in each car and come out cheaper. I would be a lousy transportation officer if I did not recommend that that be done. And we do it.

BY MR. WRIGHT:

Q. Well, you know what did happen in 1954, do you not? That was a peacetime year.

A. Generally.

Q. And you know what did happen was that the army loaded an average of 87,000 pounds per car during that year, did they not?

A. Yes, sir, during the year of that time.

Q. And that was the period that the general rate that was in effect was 65 per cent of first class with a 50,000 pound minimum, is that correct?

11,691 A. Generally, yes. That is the uniform rate.

Q. And so that when, in your presentation to the railroads, you were suggesting to them, if I understand you correctly -- I will ask you this

question first: I gather these figures and comparisons you presented to the railroads of what they could make on the 90,000 pound car, at the rates you were proposing, as compared with what they would get on a 50,000 pound car, and at the old 65 per cent rate, those were supposed to persuade the railroads that they would really make more money per car, if they put into effect the rate you were asking for instead of the rates that had been in effect?

A. We were using a rate-making factor which is a solid one that the more the shipper loads the lesser price he is entitled to.

THE COURT: All right.

Excuse me. We will take our fifteen minute recess now.

(A brief recess was taken.)

THE COURT: All right.

BY MR. WRIGHT:

Q. I think, Colonel, we were discussing before the recess your suggestion that you made, you and General Lasher, to the rate bureau, that the railroads would make more money per car on their rate of 40 per cent than on a rate of 65 per cent.

11,692 Do you recall that?

A. I recall the presentation shows we loaded heavily. We proposed a high minimum, and we were entitled to a lower rate on heavy loadings.

Q. Well, your figures went a little further than that, did they not? You did make a comparison, did you not -- do you have in front of you your proposal to the railroads? I think anyone of them will do, AWR 233 is the one that the Southern Freight Association -- if you will just give us that.

* * *

THE WITNESS: I have the statement made on behalf of the Department of Defense to the Southern Freight Association, Exhibit 233.

11,693 THE COURT: All right.

BY MR. WRIGHT:

Q. And in all of those proposals not only with respect to Southern, but with respect to the other territories, you did make, did you not, some comparison between the rates at class 40 and class 55 on Earnings Per Car Mile, Revenue Per Car. I think you will find that in exhibit 5 attached to the presentation you have in front of you.

* * *

11,694 You made comparisons there, did you not, on that exhibit between a car earnings at 65 per cent of first class and then at 55, and at 40?

A. Yes.

Q. And in that instance you showed the revenue per 50,000 pound car at 65 per cent of first class in column 4, did you not?

A. Yes, sir.

Q. And how was that figure computed?

A. Multiplying the weight times the rate, sir.

11,695 Q. That was multiplying the rate by 50,000 pounds, is that right?

A. That is correct, sir.

Q. And then when you made your comparison in column 13, of revenue per car, at 80,000 pounds, you got a figure of $662.40. How was that computed?

A. By multiplying the 80,000 pounds times the rate, sir.

Q. So what you were comparing there were 50,000 pound carloads at the 65 per cent rate, with 80,000 pound carloads at the 40 per cent rate, isn't that correct?

A. That is correct, sir.

Q. And if instead you had compared the revenue per car based upon 80,000 pound carloads, at the 65 per cent and at the 40 per cent rate, the differences would have been much greater than they appear here, would they not?

A. That's correct, sir.

Q. It is.

A. Yes, sir. However, as testified before, you cannot divorce the minimum weightload down with the rate. It is part and parcel of the weight and rate and charges. If you can load heavier, you are entitled to a lower rate. Further, this does compare 65 per cent of the old exception class rates in effect, versus column 40 of the docket 28-300 rates, because we are asking for uniformity. But I do not think it necessarily portrays the actual point-to-point rates that existed.

11,696 Q. Now, apart from that, it does not portray either the actual extent of the loss to the railroads in revenue that charging a 40 per cent rate there rather than a 65 per cent rate for 90,000 pound carloads would cost, is that correct?

A. It shows this: That we will have to load 80,000 pounds, and must load 80,000 pounds, and guarantee at least 80,000 pounds, for this rate. It shows that for the other rate all we have to guarantee to load is 50,000 pounds.

Q. Yes, I understand that, Colonel. My question was addressed to the problem of attempting to show what the loss of revenue per car would be to the railroads if you use a 45 per cent rate instead of a 65 per cent rate on a carload of a given size, t owit, 80000 pounds.

These figures here do not show that, do they?

A. If I may, let me rephrase your question a little bit --

THE COURT: Wait a minute. Can you answer the question?

THE WITNESS: Well, I want to try to get at something myself with this, if I may, your Honor.

THE COURT: All right, reframe your question, Mr. Wright.

11,697 BY MR. WRIGHT:

Q. I say it is perfectly clear, is it not, Colonel, on the face of your exhibit 5, that you have not purported even to show there the loss of revenue that the railroads would sustain if, on an 80000 pound car they moved that 80,000 pounds in that ca at a rate of 40 per cent instead of at a rate of 65 per cent?

A. It shows what you have to guarantee, 50000 times the rate. I think you are assume, Mr. Wright, that we would always load 87,000 pounds.

THE COURT: Let us not try to read his mind. He is asking a leading question. You are on the stand. If you cannot answer the question, just say, "I can't answer it." I do not want to get you trying to read his mind, or vice versa. The jury has enough problems as it is.

THE WITNESS: O. K. Sir. I am sorry. My apologies, sir.

Re-read Mr. Wright's last question then, if you will, please.

(The reporter read the record.)

THE WITNESS: No, this statement does not show a comparison of 80,000 pounds times the 65 per cent rate.

* * *

11,698 Q. Then do you also have in front of you your Appendix "A" to exhibit ACL 501?

11,699 A. Yes, sir.

* * *

THE COURT: Now, which one are you referring to?

MR. WRIGHT: I want to call attention, Your Honor, to the differences between the two.

BY MR. WRIGHT:

Q. I notice on your exhibit 5 attached to ACL 501, you have some figures representing earnings per ton-mile. Do you see those in columns 5 and 10 and 15?

A. Columns what, sir?

Q. Five, ten and fifteen on your exhibit 5 attached to AWR 233, purporting to show earnings per ton-mile, right?

THE COURT: Wait a minute. Let us be sure the jury has that page in front of them. Does everyone have that page?

A JUROR: Six and eleven.

11,700 MR. WRIGHT: I just want to point out that the columns are six, eleven and fifteen and not five, ten, and fifteen, as I had stated. Earnings per ton mile appear at 6, 11. and 15.

BY MR. WRIGHT:

Q. Is that correct?

A. That is correct, sir.

Q. Now, those ton-mile earnings were computed how?

A. By a number of tons and the miles hauled. The revenue and the tons and the mileage.

Q. Now, notice, if you will turn now to appendix "A" of sheet one of exhibit ACL 501, you have earnings per car mile figures but you have no earnings per ton-mile figure, have you?

A. No, sir. They are not to extend to that.

Q. I did not hear your last?

A. No, the ton-mile earnings are not shown there; the car-mile earnings only.

Q. Was there any particular reason for omitting the ton-mile earnings from the tabulation that you attach to the public statement you made in Ex Parte 206?

A. I cannot recall any specific one. These can, of course, be extended. Ton-miles are sometimes shown and car-miles will suffice, too, to show revenue. You can show it one way or the other, or both.

11,701 Q. If you had used ton-mile earnings, instead of car-mile earnings -- you have shown those on your table attached to Appendix A to ACL 501 -- the comparisons would not have been as favorable for your purposes as those you have there, would they?

A. I do not know. I would have to extend them.

Q. Well, you know that those ton-mile earnings do reflect the difference in whether or not you have got a car that is carrying 20,000 pounds or 90,000 pounds, don't they?

A. Yes.

Q. And you did not undertake to show that?

A. I consider a car-mile or a truck-mile earning the most important.

Q. Now, can you point, Colonel, to any destinations and origin points on your -- well, let us take it sheet by sheet.

The sheet 1 there, your Appendix A, I gather has no points of origin or destination that are within any of the areas where the railroads reduced the first class or reduced the rates on ammunition and explosives by section 22

quotations, by the general quotations to this 45 per cent of 40,000 pounds and 36 per cent on the excess? Is that correct?

A. Just a minute. Let me examine it, please.

Q. Surely.

11,702 A. I won't take too long to examine it. I find there are some here, too, within the territory where the rate reduction was made. I will point out one or two of these.

Q. Let us take the document page by page, if we can, Colonel.

On the first page there, your sheet 1 of appendix "A" to exhibit 501, are there any points, those origin and destination points, in a territory where the railroad made a general reduction of the rates below 55 per cent, first class?

A. You mean the blanket, not the point to point adjustments.

Q. The blanket. Let us take the blanket first, yes, sir.

A. Again, remembering the sheet portrays what commercial traffic moves, the answer is no.

Q. Well, you can see at a glance --

A. Not at a glance, sir. But the answer is no.

Q. On the monthly movements.

Now, with reference to point quotations, the suggestion was made by Mr. Ball that we had put in evidence here -- or we have in evidence as 219-A, being the point to point quotations made by various railroads during a ten year period of time which would have embraced these years 1954, 1955 and 1956 and 1957. Without asking you to check those figures, just check what you have here and just what we have in evidence in exhibit 219, as you state there, do you recall that any of those points you see on the first sheet there are points between which there were actual movements of military ammunition and explosives?

11,703 A. What am I comparing here, Mr. Wright?

Q. I am not asking you to compare anything at the moment, Colonel. I am asking you to look at your sheet 1 and observe the origin and destination points that are listed there and tell me, if you can, what your best recollection is as to whether or not these are points between which there were movements of military ammunition and explosives?

A. On the first sheet?

Q. Yes.

A. On Appendix A.

Q. Yes.

A. I do not know any tonnage moved between those points as military explosives. But my guess would be no.

Q. You do not see any there --

A. This is commercial traffic.

Q. I say you do not see any points there where you think there might have been a military movement under a section 22 rate of any kind, is that right?

A. I cannot swear to that, sir. Because I have received Section 22 quotations for ammunition for movements to veterans Hospitals. But it does not appear that there would be any movement there, sir.

11,704 Q. You at least do not recognize any of those points?

A. No, sir.

Q. As points where there were depots or places where there would be a substantial movement of military ammunition and explosives.

A. It does not appear here, sir.

Q. How about on the second page? There again, all of those origin and destination points are, are they not, within this territory where there was never a general reduction below 55 per cent of first class?

A. They appear to be. Again now what we are speaking about is commercial explosives traffic, and the rates existing for that traffic.

Q. Well, that does not appear to be what you are speaking about in the columns under the designation "Military Section 22 Rates", does it?

A. I believe it does so. It shows this, sir, which I think I have testified many times now, sir. We show what the carrier granted to a commercial shipper, what rates and costs he had to bear. What the revenue was to the carrier.

We showed what our proposals were, and what the return to the carrier would be on our proposals, and we showed that the carriers had established much lesser rates, with lesser return of revenue for commercial shippers than what was asked by the military. This is what this proposes to show.

11,705 Q. Well, let us take that first one on sheet 2: Trojan, Oregon to Helena, Montana. The applicable rate there is the commercial rate that is the published tariff that you are referring to, is 3.72 per hundred pounds, right?

A. 3.72 per hundred pounds, right.

Q. What you have over under column 13 is a rate that is $1.63 per hundred pounds?

A. What? Column 13?

Q. Column 13. Yes.

A. We are on page one, sir.

Q. No, this is sheet 2.

A. Sheet 2, thank you.

Q. Appendix "A", ACL 501.

A. All right, sir.

Q. Now, this published commercial rate you are referring to on explosives between Trojan, Oregon and Helena, Montana is $3.72 per 100 pounds as shown in column 6, is it not?

A. At a 20,000 pound minimum, yes, sir.

Q. And what you have over under column 13 is a rate of $1.63 per hundred pounds, right?

A. That is correct, sir.

11,706 Q. Well, did you mean to suggest that a rate of $1.63 per hundred pounds is not lower than a rate of $3.72 per hundred pounds?

A. What I mean to suggest is this, sir: The heavier you load, the lesser rate should be charged. The revenue per transportation unit, the revenue for a transportation unit at $3.72 has been extended to show a revenue per car of $744.

The revenue has been extended for a rate of $1.63 or $106.37 at 90,000 pounds, to show that for the same car hauling a car load of freight the revenue was $1,467, and that is what this statement and that line is made to show. That is the purpose of it.

Q. Well, that rate per car that you show in column 10 there for the commercial rate, that is based on the assumption that what is stated there as a minimum weight actually was the maximum weight loaded in the car, does it not?

A. It shows a commodity rate. It shows the amount of tonnage the shipper must load at 20,000 pounds, and that is a light weight for this type of traffic. It shows in my estimation, now, that the minimum and the rate were made for a shipper. The two tie together. Now, I do not know

what they load, but it appears that if he did not have to load lightly he would never ask for a 20,000 minimum, there would have been established a higher minimum at a lesser rate on the tariff, without a doubt.

11,707 Q. Well, you, yourself, of course had no knowledge as to what any of those commercial shippers were loading under any of those rates, did you?

A. Just generally.

Q. As far as this specific movement between Trojan, Oregon and Helena, Montana, did you know what the amount of any carload that moved between those points at any time was.

A. This statement shows what the tariff rate was and what the tariff minimum was. I can, of course, not speak for the shipper. I again state that it would appear that he loads around about this mark. This is the rate that is established. If there was a good movement with heavier loading, he would be a very poor shipper if he did not ask for a lower rate at a higher minimum. He is a traffic man who would be looking for a job, sir.

Q. If I understand you correctly, in your comparison what you did was multiply the $3.72 rate in column 6 by the minimum weight of 20,000 pounds, correct?

A. That is correct, sir.

Q. And then you compared that car mile figure with a carload of 90,000 pounds at a rate of $1.63 - right?

A. That is correct, sir.

Q. Now, I believe you have testified that these origins and destinations on sheet 2 were not in any area where the railroads made a general reduction below 55 per cent of first class.

11,708 A. Among other things, I testified to that.

Q. What?

A. Among other things, I testified to that.

Q. Yes. I wanted to ask you now whether, in so far as point-to-point quotations are concerned, do you recognize those by looking at the origin and destination points, as origins or destinations where there would be any substantial volume of shipments of military explosives and ammunition?

A. No, I do not identify those points as where there would probably be any volume of military shipments. I identify those points as points where rates are established for commercial shippers, and what the revenues are, what the rates are, and again how much less they are per car, than the rate that we asked for, and how much more compensatory our rate that we requested is.

Q. So that all of the figures you have in the right-hand column there under "Military Section 22 Rates" are based on an assumption, are they not, that a Section 22 tender was actually made, which, in fact, never was made?

Is that a fair statement?

A. I do not think so, sir. I think I have testified many times -- I will try again, sir, to make myself clear -- the rates roughly on the lefthand side are the rates for commercial shipper traffic. They show the revenue obtained on that type of traffic.

11,709 The rates referred to left, starting with column 12, are the revenues that the carriers would obtain at the rate level that we sought. It clearly depicts that the commercial shipper was given a better shake, actually, than what the Government asked for.

Q. But directing your attention again to the right-hand side of your sheet there, which was headed "Military Section 22 Rate" if I understand

you correctly there actually were no section 22 quotations made to the military for the transportation of ammunition and explosives between any of those points that are on the sheet.

A. As I stated before, that is my assumption. But I cannot say with definiteness, because, as I said, I received two quotations for a movement of ammunition to Veterans Hospitals. But I do not think so.

Q. Well, of course that is possible. Those would certainly be rather small movements, would they not?

A. I do not know what profit those quotations -- they were for heavy volume movements, I remember that.

Q. You would not move a carload of explosives to a veterans hospital?

A. No, but there were quotations tendered.

11,710 Q. Now, I will just take the next sheet 3. Will you look at origins and destinations there and see if you find any which are not inside this territory where the railroads never made a general reduction below 55 per cent of first class?

A. No, this is Pacific Coast Mountain City territory.

Q. And I ask you if you see any origins and destination points there where you think there might actually have been any point to point quotations made by the railroads to the military for the shipment of ammunition and explosives?

A. Again, I cannot answer definitely on that. It does not appear that there would be military traffic moving between these points.

Q. And it is also true, is it not, that all of this data that you have in column 12 through column 17, inclusive, under the heading, "Military Section 22 Rates" is the data which does not purport to reflect any quotation that was actually made to the military.

A. This is getting somewhat repetitious.

Q. Beg pardon?

A. This is somewhat repetitious and I will have to beg the jury's pardon. Again, what this exhibit shows, and the purpose of this exhibit, is to show the rates that were available for the commercial shipper, and the revenue obtained from those rates. Then the comparison is drawn of the rate that we sought, the same mileage; the amount of revenue that the carrier would obtain, moving - that we thought was reasonable, compensatory, and returned higher revenues, than the rates given to commercial shippers. This is all this sheet is meant to do, and this is its purpose.

Q. Now, maybe we can shorten this up, Colonel, if you can just call my attention, if you will, to any origin and destination points that you have here in this defendant's exhibit "A" which are within a territory where the railroads made a general reduction of the rate on ammunition and explosives below 55 per cent.

A. I will try, sir; this will take a little time, so please pardon me.

Sheet 6, Appendix "A", line 5 --1, 2, 3, 4, 5 -- five lines down, Atlas, Missouri to Big River, Missouri, where I believe that the 45 or 40 cents or 80 per cent of 40 applies, offered to the commercial shipper at 30,000 pounds, is a rate that reflects 39.5 per cent of the going first class rate. Our rate to hit 39.5 per cent would have to be well and away above the 30,000 pound minimum, At the scales given to us.

Q. Now, that Atlas, Missouri, to Big River, Missouri, that was actually an intra-state rate, was it not?

A. Yes, that would be intra-state.

11,712 Q. That is that --

A. Just one moment, please, sir. The reference looks, though, in the way it is published, that it would apply on interstate traffic, too.

Q. That is what I wanted to ask you, whether, what you have under column 5 Tariff Authority there, that is published tariff on file with the Interstate Commerce Commission?

A. That is correct, sir.

Q. And that again, now, were there any military installations that you know about at either Atlas, Missouri, or Big River, Missouri?

A. Not to my knowledge.

11,713 Q. So that whatever quotations the military made to you under Section 22 could not have any application to that origin and destination point, would it?

A. Again, these points that we are discussing show the movement of commercial traffic. It does not try to purport to show the movement of military traffic. It purports to show what the commercial shipper had to pay, and what his revenue is.

The revenues obtained by the carrier of commercial shippers.

The other side, of course, is I have gone through this I don't know how many times now, and my apologies -- shows the reasonableness of what we asked for.

THE COURT: Let me ask you a question, Colonel:

You have been using the words "reasonable" and "compensatory."

THE WITNESS: Yes, Your Honor.

THE COURT: Excuse me, Mr. Wright, a minute, I want to ask him this to clear up something:

MR. WRIGHT: Yes, sir.

THE COURT: In TEA Exhibit 5001 which is the Traffic Executives Association, Eastern Railroads --

THE WITNESS: 5001.

THE COURT: Have you got that?

THE WITNESS: No, sir, I'm sorry, I don't.

11,714 THE COURT: Well, I will read you your-this is your exhibit, I think, prepared by you: You said:

"It is believed that the present rates of this traffic are higher than a reasonable minimum base."

You used that language.

THE WITNESS: Yes.

MR. SHEA: Shall I give him a copy?

THE COURT: Well, he can look at it.

(Document handed to witness:)

THE COURT: Then the next sentence says:

"The following facts are offered in support of this position.

Is that correct? Next to the last paragraph on page 1?

A. The next to the last paragraph on page 1, sir?

THE COURT: Page 1.

THE WITNESS: Oh, yes.

THE COURT: You have used the expression, not unreasonably, "reasonable, compensatory."

THE WITNESS: Right, your Honor.

THE COURT: And you are attempting to show, I think, that the rates which you were requesting on behalf of the Defense Department would have been compensatory; right?

11,715 THE WITNESS: Right, sir.

THE COURT: Do you draw any distinction between the two words, "reasonable" or "compensatory?"

THE WITNESS: Well, any --

THE COURT: How do you arrive at whether a rate is compensatory and how do you arrive at or determine whether the rate was reasonable?

THE WITNESS: Well, a rate, to be reasonable --

THE COURT: You can look over towards the jury, sir --

THE WITNESS: I'm sorry.

THE COURT: -- because I want the jury to hear it.

THE WITNESS: This is going to take quite a bit of explaining, I'm afraid.

THE COURT: Well, let's find out what you understand the difference to be.

THE WITNESS: Surely.

There are many, many factors in rate-making.

Now, "compensatory" means, of course, that the carrier is going to receive more money than it cost him to haul the traffic.

There are two cost factors in this connection: Somtimes you refer to out-of-pocket costs, just what it cost them to put a car on, say, an additional car on a train, and you just figure what the out-of-pocket cost was to hang the car on the train. You don't figure your overhead, your trackage, your maintenance.

11,716 I can't explain this in the detail I would like to. A railroad man could probably do it better.

But that then would be the out-of-pocket cost.

A fully distributive cost would be to take everything in connection with the cost of moving the traffic and then see if it returned sufficient revenue to exceed that for a distributive cost. If it did, it could be considered to be compensatory.

THE COURT: Now, what do you mean by that? I mean, the "compensatory?" Does that mean that the railroads could, say, make a fair profit at that rate?

THE WITNESS: Well, I won't say a fair profit; they make more than their cost.

THE COURT: They make more than their cost.

THE WITNESS: Now, the margin between that, I can't speak, but what they might think is a reasonable profit. I remember figures way back in my memory were at one time, I think the Commission tried to establish some figure around 6 per cent, or something like that; not that the carriers actually earn it, but that it would mean that they could haul this and come out whole, that they will make money on it.

11,717 THE COURT: Now, tell us the difference between that and "reasonable."

THE WITNESS: Now, reasonableness -- I'm speaking now much like the Commissioner talks: You talk of a "zone of reasonableness," actually. Anything above this level is too high. Anything below that level might be too low.

Now, one of the best tests of reasonableness, if you are seeking a rate adjustment -- from my understanding -- is to try to show what moves your traffic that you are talking about, or comparable traffic, within a comparable or the same territory, against what you are seeking.

For example, we will say that you are shipping canned goods from A to B -- A to B on this map (indicating), within this territory right here (indicating).

Now, the rate that you have on your canned goods, we will say, is 70 cents a hundred. Now, within this same territory, from C to D, is a rate on canned goods. The rate on that canned goods is 25 cents a hundred.

You have got a good basis then to attack, the comparison of the same commodity moving in the same or a comparable territory, that you are entitled, too, to that lower rate.

11,718 That's the best I can tell you, sir.

THE COURT: All right, you may proceed, Mr. Wright.

BY MR. WRIGHT:

Q. Colonel, maybe we can shorten up this further by asking you, if you will, to just point out to me on this Appendix A any two points here between which you think there were any substantial movements of ammunition and explosives, on Section 22 quotations, for the military, I mean.

A. On cursory examination, I don't think there are any -- cursory.

Q. You don't think you have any?

A. I don't think so.

Q. Would you also take a look at your Appendix E, which consists of two sheets, attached to the same exhibit, ACL 501.

Do you have that appendix E in front of you?

A. Yes, sir.

Q. Can you read the heading on yours? Mine is so blurred I can't.

A. I can't, sir. The heading is pretty blurred here.

Q. Well, do you recall what that was?

A. I believe this shows the truck rates established by tariff for the movement of commercial explosives from the points listed on the sheets to the points listed on the sheets.

11,719 Q. Those are all, then, in that Appendix E published tariffs filed by truckers for the movement of commercial explosives and ammunition traffic, is that right?

A. Not all, sir. Look on Sheet 2 down towards -- about the third item up -- down almost to the line next to the third from the bottom, Fort Estill, Kentucky, to Camp Breckinridge, Kentucky, a tariff publication with minimum weights 22,000 pounds, this could move military traffic. I know of rates there reflecting 50.7 of the first class rate, 41.9 and 34.9.

Q. Are those rates you are referring to on Sheet 2, those rates are the rates from Fort Estill, Kentucky, to Camp Breckinridge, Fort Knox to Fort Estill, and are there any others -- just those two, do you mean?

A. I don't see any others offhand, no, sir.

Q. Those are intrastate rates, are they not?

A. Yes, those are intrastate rates.

Q. And you believe as to those there may have been some movements of military ammunition and explosives on the commercial published tariff?

A. This appears that there could be movements of ammunition and explosives between those points, sir; Fort Estill, Kentucky, and of course so are Camp Breckinridge, are military installations.

11,720 Q. I suppose it's always true, is it not, that if there were a published commercial tariff that was lower than the Section 22 quotation,

instead of the quotation you would use the published tariff, would you not?

A. If the tariff was lower than the Section 22, yes, we would use the tariff.

Q. And so far as the Government is concerned, the only purpose that a Section 22 quotation could serve is to give you a better rate than the published tariff could give you; is that right?

A. Not quite correct. If the Section 22 was lower than the tariff we would use the Section 22 rate given to us.

If the tariff is lower than the Section 22, we would use the tariff rate. That's correct.

Q. The section 22 rates, I gather, are by definition reduced rates quoted to the Government?

A. Well, I sometimes wondered myself how reduced they were.

Q. Well, where you find they aren't in fact reduced below the commercial rate, there is no compulsion on you to use them, is there?

A. No, but that, again, doesn't mean that a Section 22 rate tendered to you is a reasonable or right rate. Certainly we would use the cheapest rate available to us.

11,721 But we had a Section 22 rate 65 per cent of first class rate on ammunition and explosives. We certainly didn't think that was reasonable.

Q. But if it hadn't been lower than the commercial tariffs, I assume you would have shipped then on the published tariff?

A. We would have shipped --

Q. You wouldn't have used it except to get advantage of the lower rate; isn't that correct?

A. We use the lower rate, certainly.

Q. Now, I wanted to call your attention to page 11 of your statement before the Interstate Commerce Commission in Ex Parte 206.

* * *

11,722 Q. This is page 11 I want to direct your attention to, Colonel, in this first full paragraph there.

A. The first full paragraph? Yes, sir.

Q. Which reads:

"The rail portion of military ammunition and explosives tonnage dropped from over 90 per cent of the total in early 1950 to a low of only 37 per cent during 1954."

A. Yes, sir.

11,723 Q. That low of 37 per cent which you referred to was a figure which represented the shipments for only a single month for the year 1954, was it not?

A. I can't state that it represented just a month. This is a long time ago. I can't recall this precisely, but certainly it was during the period, if it was not for the full period.

MR. WRIGHT: Do you have Plaintiff's Exhibit 199?

(Produced by Clerk:)

BY MR. WRIGHT:

Q. Colonel, I wanted to call your attention to a document which has been received in evidence here as Plaintiff's Exhibit 199, and I will ask you first to read it carefully, if you will, and then I will ask you some questions about it.

THE COURT: Well, now, that appears to be about three pages, doesn't it, Mr. Wright, that document?

MR. WRIGHT: That's a letter, I think, of a page and a half, that has attached to it two or three pages of tabulations.

THE COURT: Well, it might take him five minutes or more to do that.

Suppose we recess now for lunch.

* * *

OUT OF PRESENCE OF JURY:

11,725 MR. SHEA: Before you call in the jury, may I address myself to these four exhibits?

THE COURT: Yes, sir.

MR. SHEA: That Mr. Wright asked me to read, and asked the Colonel to read.

Now, your Honor ruled on the statement by Mr. Burns, that it was not admitted for the truth of the matters asserted. As to the context of the Flanagan statement, your Honor ruled it was not admissible for purposes --

THE COURT: Of proving the truth of the matters asserted.

MR. SHEA: Of proving the truth, yes, because the person who made it was not here for cross examination, and it seems perfectly clear.

Now, as far as the context of the Flanagan statement is concerned, it is quite clear that the Burns' statement in itself takes care of that.

11,726 These other statements, if read to the jury, would certainly be highly prejudicial, and I think they will call for a great deal of explanation.

For instance, these are three specialized carriers, and Riss is not a specialized carrier. Furthermore, they were subjected to cross examination. We have not had an opportunity to really cover the cross examination but the statements made were highly qualified in the course of that cross examination. A statement made in one of the four exhibits, on the basis of cross examination, was demonstrated that they were still making a very considerable amount of money.

Furthermore, in response to those, a brief was put in.

THE COURT: A what?

MR. SHEA: A brief was put in by the Defense Department, which I have not read but which I understand demolished this position.

Now, all I am suggesting is this: (1) Quite clearly, consistent with your ruling as to the Burns' statement, I gather they would not be admitted to prove the truth of what was contained therein:

(2) They serve no useful purpose from the point of view of framing a context. The Flanagan statement was primarily directed to the matter contained in the Burns' statement, these references of inconsistencies and other statements.

11,727 But the primary thrust is there, so that they will serve no useful purpose from the point of view of context.

On the other hand, if they are read to the jury, even if purely for the purpose of framing the context, we will feel the need to frame the further context. It does not seem to me that, in these circumstances, particularly where it is quite clear that they are not admissible for the purpose of proving the truth of what they state, that these ought to be admitted.

THE COURT: Well, I do not know what they contain yet. I would like to hear something on that.

MR. WRIGHT: I think I can shorten this --

THE COURT: Wait a minute. Let Mr. Shea finish.

MR. WRIGHT: I think he is under a misapprehension as to what I propose to do with them.

This is somewhat premature, I think, before he knows what I would be using them for.

MR. SHEA: Your Honor, I thought it would be wise to thresh this out before the jury came in, your Honor. I do not know how we can arrange for your Honor -- I mean, your Honor may well want to read them. The only way we can arrange for that is for Mr. Wright to get us some more copies.

11,728 THE COURT: Let us find out what he has in mind, first. Let us hear his side first.

MR. WRIGHT. I did not have in mind offering any one of them in evidence. All that I wanted to question Colonel Flanagan about was certain aspects of his response here, which purports to be, on its face, a response not only to the statement of Mr. Burns, but to the statement of these gentlemen here.

It was suggested that it would be unfair or improper to question him about the response to what they had to say without giving him the opportunity to re-read the statements and refresh his recollection so that he would now have clearly in mind what he was responding to.

That was the sole purpose of identifying the statements, was to have them so that Colonel Flanagan might read them for the purpose of refreshing his recollection as to what he was responding to in this statement, what he was talking about. That was the sole purpose.

THE COURT: You do not propose to read them to the jury, then?

MR. WRIGHT: No, I was not going to offer them in evidence or undertake to read them or ask Colonel Flanagan to read any one of them to the jury. I had asked him to read them -- which I understand he has done over the noon recess -- simply to refresh himself.

11,729 THE COURT: That does not present any problem, does it?

MR. SHEA: I wonder whether Mr. Wright would be good enough to indicate to us just what the scope of his questions will be? I mean, we might as well have this out now before the jury comes in.

THE COURT: All right.

MR. WRIGHT: I do not have any objection to that at all.

What I was going to ask him was along these lines: Colonel, you have now had an opportunity to read these statements of these gentlemen you referred to in your 206 statement; I suppose he will say, "Yes. I glanced at them during the noon hour."

"Then, you are aware, are you not, from those statements, that those statements were from four truckers who claimed that they were specialists in this business," and I suppose he will say yes.

And that they were claiming that the impact of this 45-36 per cent general rate cut was as such as to tend to eliminate them from the business of hauling explosives and ammunition for the government.

He says, yes, that was their claim.

11,730 Then I was simply going to call his attention to the fact, as to what he had to say about their claim, that the alleged facts contained in the statements are neither relevant nor material to the issues involved in this proceeding -- "this proceeding" being the Ex Parte 206 proceeding.

That was all I had intended to do with those.

THE COURT: Mr. Shea, I do not think that presents any problem.

MR. SHEA: As I understand, three of them that I remembered, the Colonel would not respond to them that it would get them out of the business.

THE COURT: Wait a minute. Let us proceed.

MR. SHEA: All right.

THE COURT: I will hear Mr. McGlothlin.

MR. McGLOTHLIN: I want to speak briefly. I am frank to say, Your Honor, Mr. Wright has eliminated most of the problems, I think, particularly if he phrases the questions in terms of "This was their claim."

MR. WRIGHT: Yes.

MR. McGLOTHLIN: I have not said he will. The parallel that distrubs me, as you recall, there was a document in which Riss & Company filed with the ICC, in which they said, we have been driven out of the business, and your Honor excluded it on the ground it was self-serving.

11,731 Now, these are documents by four others who claim substantially the same thing.

THE COURT: But he is going to ask the witness something with reference to the statement he made, in which he considered these facts, these statements.

MR. McGLOTHLIN: I understand, If Mr. Wright limits his questions, as he has indicated, there will be no problem.

THE COURT: Let us proceed.

I do not think there is anything --

MR. SHEA: I thought we should thresh this out before the jury came in.

THE COURT: Surely. I think it is a good idea to do that.

(At 1:56 o'clock pm the jury resumed their places in the courtroom and the trial proceeded.)

THE COURT: All right, Mr. Wright.

CROSS EXAMINATION (Continued)

BY MR. WRIGHT:

Q. Colonel, you have now had an opportunity, have you, to read exhibit 199, that letter from Mr. Lindsay, I believe it is in front of you there, and has the date of 1954 on it.

A. The date of what, sir?

Q. This is the exhibit No. 199, from Mr. Lindsay -- who is addressee?

11,732 A. To Mr. E. V. Hill.

Q. To Mr. E. V. Hill. The date of that letter is what?

A. 29 March, 1955.

Q. I will not ask you to read it. The letter has already been read to the jury. But I wanted to direct your attention to the figures he is talking about in the letter showing the relative proportions of government ammunition and explosives traffic that moved by rail and by truck.

Do you see those figures attached there?

A. The very first sheet thereafter?

Q. There are several sheets there, I think, aren't there? The first one shows Army, the next Air Force, the next one Army and Air Force combined?

A. Just a moment, sir. (Looking at the document.) Yes, sir.

Q. And those figures, the figures that he has there came from your office, did they not?

A. I cannot state with certainty that they did. I can state this, just as General Lasher stated from the stand: That people that had a need to know or were worth showing the figures, that we would make such figures available to them.

11,733 I know that during my tenure in office I did make figures available to the rail carriers on their percentage or share of the tonnage. I am inclined to think that these might be figures, certainly from the Department of Defense, for two reasons: (1) I notice that Mr. Burns apparently had access to them and quotes the 37 per cent figure in his statement for one reason in connection with it.

So, while I am not able to state with preciseness, I did give figures to the rail carriers.

Q. And they do appear to you as far as you know, to be accurate figures? That is what I was principally interested in.

A. You are asking me to recall something now that is back quite a ways. I do not know as I can swear to that.

Q. Well, I understand you do not carry around in your memory the percentages for months.

A. Right, sir.

Q. But, having examined the statement you have no reason to doubt the accuracy of any of the figures you see there, do you?

A. Well, I do not know. These are figures, of course, that Mr. Lindsay is writing to Mr. Hill.

Q. Yes, but you do not have any doubt that those are figures that came from your department? Your department did regularly, as I understand you, assemble those figures and make them available to the carriers?

11,734 A. I have so testified. But I do not believe I can testify that these are figures that are from my department.

Q. Well, then, anyway, the 37 per cent figure that you see there, that relates to the percentage the rail carriers had on military shipments for the month of November, 1954, does it not?

A. It is so indicated here in this letter.

Q. And then if you will turn to the last page, which I think has the combined army and air force shipments, you will find the figure for November, 1954, is 47 per cent, is it not?

A. November of 1954?

Q. Yes, 47 as distinguished from the 37 for army alone.

A. 47 per cent. It is so indicated here, yes, sir, yes, sir. 47 per cent total, versus 53 per cent.

Q. Now, you also had an opportunity, Colonel, to refresh your recollection by reading their statements as to what Collingsworth, Mr. Jeans, Mr. Hughes and Mr. Tate had to say in that Ex Parte No. 206 proceeding?

A. Yes. I read them through the noon hour very quickly.

Q. And you now recall, do you not, that what those four truckers were complaining about was that the effect of these general rail rate cuts to the 45-36 per cent level, on their business was very severe?

A. These specialized carriers did so complain.

Q. That was the claim they were making and the claim to which you were responding in this statement that is in evidence here as ACL 501, the statement you made in Ex Parte 206 in reply?

A. It is in response. But my statement in 206 is primarily in response to Mr. Burns' statement.

Q. Well, your point "A" if you will look at the first page of your Ex Parte 206 statement, you say "The alleged fact contained in the said statements are neither relevant nor material to the issues involved in this proceeding."

A. Right.

Q. By "this proceeding," you refer to Ex Parte 206, right?

A. Yes.

Q. By "said statements," you were referring to not only Mr. Burns but the statements of the four motor carriers there?

A. Yes, sir.

Q. Your next point, your Point B was that the principal relief sought by the Munitions Carriers Conference, Inc., "is beyond the jurisdiction of this Commission to grant."

Now, I think you previously testified that you were referring there to the claim that was being made not only by the Conference but by these four carriers, that the Commission ought to establish some kind of a floor under Section 22 quotations on ammunition and explosives; is that correct?

11,736 A. More or less. It is a statement to the effect that we do not think they have jurisdiction over Section 22 rates.

Q. Now, to your knowledge, Colonel, Riss & Company has never asked the Commission at any time to establish such a floor under a Section 22 quotation on ammunition and explosives?

A. Not to my personal knowledge.

Q. Well, any knowledge at all? Did anybody ever tell you that Riss & Company had made such a claim?

A. No one has ever told me. But I can't say they didn't, not to my personal knowledge.

Q. Then I wanted to call your attention, Colonel, to a paragraph -- I think it is the second full paragraph on page 11 of your statement in Ex Parte 206.

A. Would you again mention that paragraph?

Q. Page 11, if you will look at the second full paragraph there.

A. The second full paragraph?

Q. The one that begins "In the last paragraph of Part II of his verified Statement", do you see that?

11,737 A. Yes, sir, I do.

"In the last paragraph of Part II of his verified statement, Mr. Burns states that Interstate Motor Carriers are presently transporting two billion pounds (or 1,000,000 tons) of ammunition and explosives annually."

I had examined Mr. Burns' statement that was read in evidence here, by your statement. I had not been able to locate such a statement by him in Part II of this statement or in any other part. I wondered if you could point out where it is that Mr. Burns made the statements we are talking about?

A. Well, I am certain it is not a typographical error. I am sure it is or must have been his statement.

Now, Burns had two statements. He had a statement in Kansas City. He also had a statement at the Washington hearing. This may very well refer to the Washington statement. I do not know.

Q. I think you are referring to some other statement than the one that was put in evidence.

A. There is two that were put in. Burns made a statement at Kansas City, and then Burns made a statement at the Commission here, at Washington, D. C.

A. There were two put in evidence in the Ex Parte 206 proceeding, is that right? Two statements by Mr. Burns?

11,738 A. To the best of my knowledge, yes.

Q. What I was referring to was the one that was put in evidence here which I had understood was the one to which this reply was addressed. It now appears, I take it, that you were replying not merely to that statement but to some other statement as well?

A. This would be in reply to both Kansas City, and I believe for Washington as well. Anything that we had before us that Burns had submitted.

Q. Do you have a copy, Colonel, of this other statement that you are now referring to?

A. Not in front of me, no.

Q. Do you suppose you could get one for us so that we would have definitely established what these statements were, all of them that you were undertaking to reply to?

A. I would suggest that the burden not be placed on me. They are on file with the Commission. I would suggest that you obtain one, Mr. Wright.

Q. You would happen to be the gentleman who was making the reply here. I suppose you are the only one who can really say with certainty exactly what statement you were undertaking to reply to. I suppose, in any event, we have had to submit, whatever was obtained, to you, to determine whether or not that was also a statement to which you replied, is that correct?

11,739 A. I would have to have both statements, I would have to see both the Burns' statements.

Q. Yes.

A. To be sure which is which, and what has been said in toto.

Q. Well, I guess all we can do at the present time, then --

A. Let me make a further statement. Without producing Burns' statement one way or the other, this portion which reads -- the last paragraph of Part II of his verified statement, Mr. Burns states: "Motor Carriers are presently transporting two billion pounds (or 1,000,000 tons) of ammunition and explosives annually. This appears to compare very favorably with the rail tonnage of approximately 1,400,000 tons transported during fiscal year 1956."

To the best of my recollection in working with this statement, those figures represent figures that were filed with the Interstate Commerce Commission for the fiscal year of 1956.

Q. Fiscal year 1956 that you are referring to there, that year ended when? July 1of 1956?

A. I believe on June 30, 1956.

Q. Fiscal 1956 ended on June 30, 1956.

That would include, I suppose only a couple of months of the period after the last of these general rate cuts were made which reduced the level to the point 5- '56 ratio?

11,740 A. It certainly would include a broad portion of the eastern carriers. It would include a lesser portion for the Western and Southern carriers.

Q. Yes, as I understood you, they went down to that level in the spring of 1956?

A. You are correct.

Q. And fiscal 1956 would have ended in June, as you say?

A. Correct.

Q. Do you recall now what period of time is covered by the statement of Mr. Burns that you referred to?

A. Not without his statement of what particular period he is covering. I presume he is covering the fairly current period. But I cannot speak with authority without seeing his statement.

Q. Well, I suppose if you wanted to compare what the impact of these cuts had been on the ratios of motor carrier and rail tonnage, the best comparison I suppose would be to look at the figures for fiscal 1955, which ended June 30, 1955, but if you wanted to get a period before the cuts

took effect, isn't that so? You wanted the base period before any of it had taken place. If you wanted to use a fiscal year, you would have to use fiscal year 1955, isn't that correct?

11,741 A. It would be my guess that fiscal year 1955 would handle less tonnage hauled by rail. But this is a guess. Without examining the figures, I could not say.

Q. If you want to make a comparison of what the percentages were before and after these cuts to compare fiscal '55 with fiscal '57, fiscal '57 would include a period entirely after the last of those cuts had gone into effect, isn't that correct?

A. Well, fiscal, if you wanted to compare it, naturally you would want more current figures. You want to know what is going on now. You would have to have more current figures than the figures we are talking about.

Q. Fiscal 1957 was not available to you at the time you made this statement, because the date of your statement is April 30, 1957.

A. The fiscal year had not terminated yet, no.

Q. Now, I think you also referred, Colonel, at page six, or during your direct testimony, to a paragraph on your statement in Ex Parte 206 which you said had been stricken. I think that was the first full paragraph on that page. Do you have that in front of you?

A. Yes, I testified to that, to the best of my recollection that was stricken and not put in with the Commission.

11,742 Q. This paragraph which begins -- will you read the paragraph so we know what you are talking about?

A. "Appendix A more than substantiates the findings of the Bureau of Transport Economics and Statistics which Bureau found that Section 22 rates ranged approximately thirteen to fourteen per cent higher than comparable commodity rates. Such finds were published in the August and

September, 1955 issues of "Transport Economics" issued by the Bureau of Transport Ecolomics and Statistics of the Interstate Commerce Commission."

It is a true statement.

Q. Now, the part that you have just read, those two sentences were, however, stricken by you voluntarily, were they not?

A. As I recall now -- this is the best of my recollecting.

MR. BALL: May I approach the Bench?

THE COURT: Yes.

(At The Bench.)

MR. BALL: We had figures produced from the files of the Munitions Carriers Conference.

MR. WRIGHT: What?

MR. BALL: Some figures from the files of the Munitions Carriers Conference; they have stated the total expenditures for rail and motor carriers for fiscal 1954, 1955, 1956 and 1957. I am perfectly willing to let this document be available for cross examination if you want it.

11,743 MR. WRIGHT: I have no information about those figures at all.

MR. BALL: They were identified.

MR. WRIGHT: This has nothing to do with the question I have asked here.

THE COURT: He is trying to help you; that is all.

MR. BALL: Yes, that is all. It is perfectly all right.

(In open court.)

MR. WRIGHT: Could you read the last question?

(The reporter read the question.)

THE WITNESS: Reading from the very part Appendix A and through the portion I read to the jury, ending up "Such findings were published in the August and September, 1955 issues of Transport Economics issued by the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission," that was stricken and not submitted.

It is a true statement. I can be proven by examination of records.

BY MR. WRIGHT:

Q. Why was it stricken, Colonel?

A. This was not stricken just by me. This paper of course is a carefully considered document, for the presentation of the Military Traffic Management Agency.

11,744 I am trying to think, there are probably several reasons or could have been several reasons. This is a long time back now. I think that one reason that it was not put in is that we were talking ammunition rates in here, and this Appendix A covers a broad scope of commodities other than ammunition alone. Now, I cannot swear to this, but this seems to be right, according to my memory.

Q. Well, if you will just read that first sentence, Colonel, which says "Appendix A more than substantiates the findings of the Bureau of Transport Economics and Statistics, which Bureau found that Section 22 Rates raised approximately 13 to 14 per cent higher than comparable commodity rates," it is perfectly clear, is it not, on the face of your Appendix "A" and that particular sentence, that your Appendix A does not establish any such fact?

A. Appendix "A", by examination, is for ammunition rates only, explosives rates. The citation here from the statistics of the Interstate Commerce Commission, is for all commodities that moved on Section 22.

I have testified to the best of my recollection, I think this statement was taken out, and I am searching back in my memory now, because of the fact that we were talking of two things within that statement; Ammunition and all other commodities, while here we are really talking about and want to present in our statement only ammunition.

11,745 Q. That is Appendix A -- that is all it presents, is it not?

A. That is all it presents, is ammunition.

Q. And you certainly did not want to give the impression, I suppose you would not want to give the impression to this jury that Section 22 rates on ammunition and explosives averaged 13 to 14 per cent higher than the published tariffs on ammunition and explosives, would you?

A. They may be even higher, looking at the commodity rates here for the shipper, and in comparison with what we proposed, which wasn't in existence.

Q. Colonel, maybe I misunderstood your prior testimony, but in so far as the Department of Defense's use of Section 22 rates is concerned for the shipment of ammunition and explosives, if the Section 22 quotation was not lower than the published tariff there would not be any occasion for you to use it?

A. I think I know what you are talking about and you say "published tariff." As I explained once before, sure there is Class Rates, publishing of tariff, from any point that you want to ship that the carrier will move. Those are class rates. They move little or no traffic, but they are published rates.

11,746 To the best of my recollection from past studies in the rate business, approximately 95 per cent of the tonnage, or 90 to 95 per cent of the tonnage in the country moves on commodity rates.

So, if you are talking about the Section 22's being below the published class rates, yes, they are below published class rates. But not when you compare them with commodity rates, as we have in this exhibit in Appendix A, available for the commercial shipper for movements of explosives, they are not below it.

Q. Well, Colonel, regardless of the reasons, the statement you have in front of you, with this paragraph in it, was not the statement which was finally submitted by you to the Commission in Ex Parte 206, is it?

A. This portion of the statement was not submitted.

Q. That portion of the statement was stricken and another paragraph substituted for it, is that correct?

A. Well, I cannot recall the exact substitution or what was substituted. As I said, to the best of my memory, this was what I testified to, the best of my memory, when I even read this to the jury, it clicked a little bit in my head, that is my memory that this was not presented. I cannot testify what might or might not have been presented.

Q. I understood on your direct evidence, Colonel, you did say that this particular paragraph was stricken from your statement?

11,747 A. To the best of my memory.

Q. And this is what your recollection is now, is it not?

A. Correct, sir.

Q. It was stricken?

A. I so stated.

Q. Did you inform Mr. Shea that this paragraph in your statement had been stricken from it before you were offered as a witness here?

A. No.

Q. You did not tell him that?

A. I did not tell Mr. Shea about this at all.

Q. And you recall when you were examined on deposition by me, you did not say anything to the effect, when reference was made to your statement, that this or any other paragraph in it had been stricken, did you?

A. When I was examined by you in my deposition -- and I have a copy in my brief case -- I was reading precisely, and looking at precisely what had been presented.

Q. But, I repeat, Colonel, the fact is that actually there was no full copy of this identified as an exhibit when your deposition was taken, isn't that correct?

11,748 A. Let me state this: This was handed to me on the stand. I read it out loud to the jury. When I got to this portion, my recollection was that it had not been presented to the Commission. I felt it was my duty at least to point out that recollection, being on the stand. I did that, to the jury.

Q. What I was referring to, Colonel, was what happened when your deposition was taken, when Mr. Shea took your deposition, a copy of this statement as such was not identified as an exhibit, was it?

A. Will you repeat that question again?

Q. I say, when your deposition was taken by Mr. Shea, the full statement that was offered in evidence here was not identified by you and marked as an exhibit at that deposition?

A. I do not think it was.

Q. All that I --

A. I remember quoting extensively from it.

Q. All that Mr. Shea did was to ask you about specific parts of it, and you either quoted from it, or read the parts?

A. To the best of my memory, that is correct.

Q. And you do recall that you made no statement at that time, o r at least on the deposition record, to the effect that any part of this state- m ent you made in 206 had been stricken by you or anyone else?

11,749 A. The statement that I was referring to during the time the deposition was taken, was the statement that was factually presented and was correct and proper.

Q. You mean the statement that you were referring to when your deposition was taken was not a true copy of the one which is offered in evidence here, is that what you are telling me -- the one you have in front of you?

A. I do not state that. What I am stating is that when I read this the other day -- and I remember this fairly well, not the incident, but I remember this statement very well, because I sweat blood making it and writing it.

When I saw this part here, I recalled that that had not gone into the Commission. I honestly did my best to say to the jury, "I do not think that went in," and I think the jury remembers it, too.

Q. Colonel, I am sure you did. But I am directing your attention to what happened at your deposition.

Is it now your recollection that you were not questioned by Mr. Shea about this statement which has been marked in evidence here, but about another copy which did contain in it a true and correct statement of what was actually presented on page 6 rather than the statement we have here which contains the stricken paragraph?

A. Will you read that question for me, please?

THE COURT: Read the question.

11,750 (The reporter read the pending question.)

THE WITNESS: That is correct. And I will add -- and I am pretty familiar with this -- about the only differences will be probably this paragraph and some tariff references that were in there.

MR. WRIGHT: I have nothing more.

THE COURT: Anything further on redirect?

MR. SHEA: I have nothing further.

THE COURT: All right. The witness is excused.

THE WITNESS: Thank you, very kindly.

(witness excused.)

* * *

11,752 MR. BALL: This was a deposition taken at Menlo Park, California, July 9, 1959. I am starting at the top of page 3 of the deposition.

MR. RHOADS: Page 3?

11,753 MR. BALL: Yes. (Reading)

"By Stuart S. Ball:

"Q. Will you give the reporter your name and present occupation?

"A. Paul F. Yount, 175 Linfield Drive, Menlo Park, California, Executive Vice President, Staff, Consolidated Freightways.

"Q. Now, General Yount, will you also give the reporter the background of your career prior to the time that you became Deputy Chief of Transportation of the United States Army? I don't mean too long a biography, but some general --

"A. I was in both the Corps of Engineers and Transportation Corps and was a general officer of the Army from 1944 until I was appointed Chief of Transportation.

"Q. Were you a West Point graduate?

"A. Yes, class of 1930.

"Q. And your career then was in the army up until the time of your retirement?

"A. Correct. I was regular Army from 1930 until I retired in 1938.

"Q. And you retired, I understand, with the rank of Major General?

"A. That's right.

"Q. And you hold retired status today?

11,754 "A. I do.

"Q. Consolidated Freightways, as I understand it, is a common carrier of freight by motor vehicle?

"A. That is correct.

"Q. If I recall, it is the largest today of the --

"A. I am not an expert on statistics, Mr. Ball. It is one of the large motor carriers of the United States.

"Q. And it is a carrier both of general commodities and of explosives?

"A. That is correct.

"Q. And it is also a long distance carrier in the sense that it transports intercity?

"A. It is an over-the-road interstate carrier.

"Q. And its territory covers all of the Pacific Coast area and extends how far east, General?

"A. Presently we have authority as far as Cincinnati and Dayton, Ohio.

"Q. And if I recall, you extend from Washington through to the southern end of California?

"A. That is correct.

"Q. Now, about August 1, 1952, you became, if I recall, Deputy Chief of Transportation of the United States Army?

"A. Would you quote that date again, Mr. Ball?

11,755 "Q. August 1, 1952?

"A. That is correct.

"Q. Now, will you describe for us the organization at that time of the United States Army with respect to transportation at the time you became Deputy Chief?

"A. Well, we had a military operations, A Supply and a Traffic Division, basically. Those were the three main elements of the office.

"Q. Let me go back a minute. Who was the Chief of Transportation?

"A. Major General Frank A. Heilman.

"Q. And he reported to whom?

"A. At that time, he reported to the Chief of Staff.

"Q. Directly to the Chief of Staff of the --

"A. Through G-4. The title was later changed to Deputy Chief of Staff. (Logistics.)

"Q. On January 25, 1954, you succeeded General Heilman as Chief of Transportation of the United States Army?

11,756 "A. That is not quite correct. I succeeded General Heilman on the first day of April, 1953, as Acting Chief and I was carried in an acting capacity until my nomination was confirmed by the Senate on a date in January -- the 25th of January.

"Q. 25th of January, 1954, and you held that post through January 31st, 1958?

"A. That's correct.

"Q. And did you continue, both as Acting Chief and as Chief of Transportation, to report to the Chief of Staff?

"A. Through the Deputy Chief of Staff Logistics. I have forgotten the date which that actual change took place.

* * *

11,758 "Q. Now, what is the fact as to whether or not you operated under what is known as the Joint Army Air Force Adjustment Regulation of 1947?

"A. JANAF was completed at the time of the reorganization of the Services.

"Mr. Reporter, did you get JANAF-Joint Army, Navy, Air Force Adjustment Regulations -- no, wait a minute -- Joint Army, Navy Air Force Adjustment Regulation -- JANAFAR.

11,759 "Q. Now, Under that regulation --

"A. Wait a minute. Mr. Reporter, the first thing, that was Joint Army Air Force Adjustment Regulation.

"Q. That was in 1947?

"A. That was in 1947.

* * *

11,760 "THE WITNESS: Since the Air Force had previously been the Air Corps of the Army, all of the so-called technical services of the Army had provided direct service to the Air Corps. When it become a separate service with its own secretary there were a great many adjustments of administrative procedures that had to be made, and they were made in this regulation. The one of immediate concern, of course, was that the Army retained responsibility

for providing traffic services to the Air Force. That was changed. These regulations went through a period of constant change through the years as the Air Force became able to pick up more and more of their own administrative management. It would be very difficult without a thorough search of the records to find out who did what as of a specific date. As of the date of the regulations, they spell it out exactly, but they were subject to change by mutual agreement of the two secretaries and so they were in a constant state of change.

"MR. BALL. Q. Well, now, were those regulations published regulations that were found in the --

"A. It was a public document.

"Q. What is it, do you remember, where the regulations are published? The Federal Register?

11,761 "A. Frankly, I do not know. I would doubt very much if Army and Air Force Regulations are published in the Register, but I can't answer.

"Q. Do you recall whether or not these regulations were available to the public or were they classified?

"A. They are not classified, I am quite sure. They were public documents.

"Q. Now, when you became Deputy Chief of Transportation in 1952, then as Chief of Transportation, you normally supervised the routing of transportation for the army and for a substantial part of the Air Force, is that correct?

"A. I would answer that excepting for the word 'substantial', we did do some for the Air Force. We are getting into an ambiguous term in 'substantial'. It was a sizable volume, yes, but percentagewise to the Air Force, I would have no recollection of what it represented.

"Q. And, specifically with respect to the transportation of ammunition and explosives, do you have any present recollection of how much of that you handled for the Air Force?

"A. It would be a very large percentage of it because the Air Force ammunition was, in general, stored in Army facilities and it was managed under the direction of the Army Ordnance Corps.

11,762 "Q. Now, if I recall, in 1957 there was a reorganization that resulte in the creation of the Military Traffic Management Agency?

"A. Correct.

"Q. Will you describe what the Military Traffic Management agency was, as created in 1957?

"A. It is a joint agency having representatives of the three services on it. Command-wise and functional-wise it is a part of the Department of the Army and is a subordinate part of the Transportation Corps of the Army. The Secretary of Army is responsible to the Secretary of Defense for the functioning of this agency."

* * *

11,763 "Q. What part do the Navy and Air Force play with this agency?

"A. They furnish personnel and it, in turn provides services.

"Q. It has the same functional relation to each of the three services?

"A. Correct.

"Q. Now, you have already mentioned that the -- strike that.

"What was the general description of the function of the Department of the Army that you headed either as Deputy Chief of Transportation, Acting Chief, or Chief of Transportation?

"A. The Transportation Corps.

"Q. The Transportation Corps?

"A. Of the Army.

"Q. And the Transportation Corps was, itself, divided into the three divisions you have mentioned, Military --

"A. Only the office. The headquarters of the Transportation Corps was generally as I have stated.

11,764 "Q. That is Military Operations Division, Supply and Personnel Division and Traffic Division?

"A. That's correct.

"Q. Now, if I recall the Transportation Corps itself had not only its head office in Washington but it had branch offices or branches?

"A. And it had command installations all over the country. I think the matter you have reference to is that during the period of the Korean War, the function of routing of traffic was decentralized from Washington to field offices known originally as Zone Offices.

"Q. And there were five of those offices or what was it?

"A. There were four.

"Q. Can you identify the location of --

"A. Pittsburgh, Memphis, St. Louis and Salt Lake.

"Q. But the headquarters office at Washington also did some routing for the territory --

"A. They did routing under special circumstances or for the military district of Washington; otherwise, they functioned as a policy and over-all supervisory office, not as a part of the normal routing mechanism.

11,765 "Q. Each of these three divisions you have mentioned, Military Operations, Supply and Personnel and Traffic was headed by an individual?

"A. That's correct. Generally speaking, there was an assistant chief for each of those main areas.

"Q. But when you were Deputy Chief, you were --

"A. I was the immediate superior --

"Q. You were the immediate subordinate of the Chief of Transportation and the immediate superior of the--

"A. Assistants.

"Q. Of the three assistants?

"A. Yes.

"Q. Can you supply the names of the three assistant chiefs during the period 1952 to 1958?

"A. Well, that's quite an order.

"Q. To the best of your recollection?

"A. In the traffic side, which is of primary interest, there was Colonel S. R. Browning -- no, Colonel E. B. Gray, Colonel S. R. Browning and Col. -- no, Brigadier General, at that time E. C. R. Lasher.

11,766 "Q. Those men succeeded each other?

"A. That was the sequence, as I recall it, of the holding of the post of Assistant Chief for Traffic.

"Q. I am going to ask you if you can identify a few people by name. One is Col. Harpold.

"A. Harpold was in the traffic section and, at one time, headed up the freight division.

"Q. And he was located during that period in Washington?

"A. Washington.

"Q. Then another one that you, perhaps can identify, is Lt. Col. Andrew Paul Flanagan?

"A. He headed up the Rate Negotiations Section, if I recall the title of his specific section in the Chief's office. It was part of freight traffic.

"Q. Now, when you spoke of three divisions, Military Operations, Supply and Personnel and Traffic, was the Traffic Division, in turn divided between Freight and Personnel?

"A. Freight and Passengers, yes.

"Q. Within the traffic division?

"A. That's correct.

"Q. And then each of those divisions in turn was headed by an officer, is that correct?

11,767 "A. That's correct.

"Q. So that Lt. Col. Flanagan, as Chief of the Rate Negotiations Branch of Freight Traffic Division, reported to the Chief of the Freight Traffic Division, who, in turn, reported to the assistant chief of transportation who was --

"A. The Assistant Chief of Transportation (Traffic).

"Q. Oh, Transportation and Traffic?

"A. No, Transportation paren, Traffic, close paren.

"Q. Who, in turn, reported to you when you were Deputy Chief --

"A. Well, I think you must recognize both the Chief and Deputy Chief as being sort of a pair. They are one entity. Either one acts with the full authority of the office.

"Q. Well, whatever action you took as Deputy Chief was the same as the action of the Chief --

"A. That is correct.

"Q. During that period of time. Now, will you describe, to the best of your recollection, the function performed by the so-called traffic division, especially freight traffic, with respect to freight traffic.

"A. Well, they performed all the functions of insuring the movement of freight for the United States Army anywhere in the world. They established policy with regard to the handling of freight. They did a nominal amount of routing local in nature as I have already stated. They conducted analyses of freight movements with regard to rates. They provided over-all supervision of the zone offices.

11,768 "Q. Did they establish the policy for allocating and routing traffic for the different forms of transportation?

"A. Within the framework of the policies laid down by the Department of Defense during that period.

"Q. Now, were those functions of the traffic division in turn allocated to these four offices during the period of the Korean War, these four regional offices you have mentioned?

"A. The four regional offices?

"Q. Yes.

"A. The routing was hardly, I can't tell you the date at which the decentralization was effective. I was in Korea. But it was during that period that they did decentralize and, at that time the regional offices took all the responsibility for routing. And a post, camp or station would call the zone office for a routing on traffic where that was in excess of 10,000 pounds.

11,769 "Q. And that was the organization that was in effect when you returned in 1952 --

"A. That is correct.

"Q. -- to be Deputy Chief of Transportation? And that decentralization continued for how long, Gen. Yount?

"A. So far as I know, it continues to this day. Now, it has been modified. Some of those locations have been changed under the Military Traffic Management Agency, but the functioning of it is still essentially the same.

"Q. Now, during the period beginning August 1, 1952, when you became Deputy Chief, did you have written policies for the allocating and routing of such military traffic as ammunition and explosives between forms of transportation?

"A. Yes, there were written policies.

"Q. And those policies were formulated by whom?

"A. They were actually formed and promulgated under the authority of the Chief of Transportation. However, they were in conformity with the DOD policies -- the Department of Defense policies -- which were again promulgated in the name of the Secretary of Defense. The actual responsible officer was the Director of Transportation and Petroleum Logistics.

11,770 "Q. Were these policies for allocating and routing military traffic again published to the public or were they classified?

"A. No, they were published.

"Q. They were published?

"A. Never any secret about army traffic policies.

"Q. Now, to the best of your recollection, what was the policy with respect to allocating and routing of military traffic between different carriers?

"A. Basically, the controlling policy in all cases is economy of movement.

"Q. In other words, the army sought to obtain the lowest rate available for the transportation of its commodities between point and point?

"A. That is correct.

"Q. Subject, however, to special requirements of service and time?

"A. There are, obviously, modifications of that, and it would be better stated, perhaps, as the lowest cost that meets the service requirement. The service requirement might be one of time. It might be one of facility or something else, and so the economy would have to be reviewed in the light of the service demand.

11,771 "Q. Well, now, I am going to ask a few question designed to get at your recollection of the application of these policies, as you understood them. Let us suppose that you had a shipment to run between -- a series of shipments between two specifie points. There might be available two railroads and two trucklines to carry that transportation. How would that policy be applied in the allocation of the transportation assuming that their rates were exactly the same?

"A. If their rates and service were exactly the same, the railroads would have gotten essentially half the traffic. The division between those two railroads would be predicated upon their proportion of the rail capability in the area they serve. The truck lines would have also had a division of the traffic in relation to their capability.

11,772 Now, it is a little easier to administer and it is a little easier to describe with respect to the railroads because there were fewer of them and their facilities are more easily determinable as to relative size, and that is kept on a carload basis in which they attempt to balance off over a

period of quarters and a period of the year, a distribution of carloads which represents the relative capability of the carriers. But I must point out --

"Q. The approximations would be rough, however, would they not?

"A. Of course, they are. In the administration of it, you can never be exact in the thing. It is merely, I think, in all good conscience, a honest attempt to obtain an equitable, not anequal division of traffic.

"Q. And the longer the period of time, the more equitable the distribution would be because of the ability to make the adjustments from time to time?

"A. That is correct. You could never do it in a short time such as a month. You have to do it on a longer period.

"Q. Let's assume, just to test your recollection of the application of these regulations, that you had three trucklines and one rail route that was available, all giving essentially the same service with comparable services and rates. How would the division be made?

11,773 "A. The rail carrier would have had half of the business and the truck lines would have had the remaining half divided amongst them to their capabilities. Now, there again, you must go back to the service, the question of the destination, the terms under which it originates, so that there is no exact distribution or division of this traffic that you can claim. It isn't an exact science by any means.

"Q. No, but the effort would be that over a period of, say, a year, under those circumstances, the divisions would be approximately 50 per cent between the railroad and 50 per cent between the trucking concerns?

"A. That was the general attempt.

"Q. And, as between the various truck lines, assuming there were three, the division again would attempt to be equitable depending upon their service facilities?

"A. That is correct.

"Q. Now, the rates for much of this military traffic were known as Section 22 quotations, were they not?

"A. Considerable movement of explosives was on Section 22, yes.

11,774 "Q. You understand what the section 22 reference is?

"A. Very well.

* * *

11,774 "Let me ask you if, to your knowledge, efforts were made by the Transportation Corps, U. S. Army during the period that you were either deputy chief or acting chief or Chief of Transportation to obtain lower Section 22 quotations for ammunition or explosives?

* * *

MR. RHOADS: The answer is "There were such efforts made, both by rail and by truck."

MR. BALL: Let us skip then to the bottom of the page 18, line 26.

11,775 "Mr. Ball. Q. What is the fact as to whether or not you reviewed any of such studies and recommendations by the Rate Negotiation Branch?

"A. I did review their progress both as to the time of performance and also as to their general findings. I have, at this time, no recollection of the details of their reports but Colonel Flanagan, through his immediate superiors, did keep me informed of it and of their general findings.

"Q. What is the fact as to whether or not these studies and reports pertaining to rates affected both rail and truck carriage?

"A. The major study was directed at the rail rate. The studies with respect to motor carrier would have been more on a spot basis than on a general basis. I have no personal recollection of a general study and a general approach to the motor carrier industry on the rate levels.

"Q. Now, the function of the -- I am going back to a leading question form here just to save time, Mr. Bridgeman.

"Mr. Bridgeman: We will see what it is.

"Mr. Ball: The function of the Traffic Division was assumed and preserved by the Military Traffic Management Agency when it was organized in 1957, is that correct?

11,776 "A. The actual pattern of operation did not change just by virtue of creating a joint agency. Some of the small details changed, but the broad policies since they were written by the Department of Defense anyway and were only promulgated by the three services, did not change.

"Q. Again testing your recollection of the application of the policy of allocating traffic, if you had a large movement involving the equivalent of several carloads, what would be the fact as to whether or not such a shipment would be divided between forms of transpcrtation?

"A. Well, service movements are really wholesale movements and when you tell me a few carloads, you are talking about a relatively inconsequential movement.

"Q. No, I mean, a movement at a single time between two points of several carlots of munitions.

"A. Well if you had -- let's be specific -- say three carloads of ammunition, the equivalent of three carloads --

"Q. To move on a certain date?

"A. To move on a certain date to a certain destination. First, where is it located? Is it rail served or is it highway served? Because not all of the storage facilities are served by both means of transportation. Is the receiving installation rail served and highway served? Those two points would have to be determined before you could even approach the problem.

11,777 "Q. Then assuming that you had such a shipment of the equivalent of three carlots of munitions between two specified points and a railroad and a motor carrier could provide equal facilities at substantially identical rates, how, then, would the policy be applied?

"A. On a three-carload shipment, you would undoubtedly give it to either one or the other and, on the long term, equalize. But three carloads, I still say, is a relatively small business transaction to the army.

"Q. What you have said there becomes even more pertinent when you are dealing with shipments in smaller quantities?

"A. That is correct.

"Q. You wouldn't attempt, in other words, to make a division of traffic with respect to any single shipment or movement?

"A. No, they would attempt to balance on a longer term basis.

11,778 "MR. BRIDGEMAN: For clarification, Mr. Ball, you refer to a single shipment or movement. I take it you are referring to a single carload or truckload?

"MR. BALL: No, I am referring to a movement to be made at a particular time.

"THE WITNESS: I answered it in the vein that it was a specific order for movement which might involve any sum from 101000 pounds up to 10,000 tons.

"MR. BALL: Q. In other words, a single order for movement would generally be placed between two specific points on a single form of transportation, a single carrier?

"A. In order to obtain the service in a timely fashion, it might be necessary to split such a thing. If you are talking about a shipment from 40,000 tons, you could very well have a distribution between various modes of carriage.

"MR. BALL: Mr. Bridgeman, I invite you to interrupt with questions of this kind so that we can clarify the question. I think both sides are interested, on this subject, in merely bringing out the fact.

11,779 "MR. BRIDGEMAN: I had previously understood when you referred to a division where service considerations are equal that that referred to divisions of particular movements between the different modes of transportation. I now understand.

"THE WITNESS: But the problem in trying to answer that question intelligently all hinges on: How big is the movement? And I endeavored to point out that the army is shipping in wholesale lots, so some of these movements are pretty sizeable movements and, for that reason they might be broken up. If we are talking about a shipment on the order of the equivalent of three rail carloads, it would be, I would say, almost certain that it would not be broken. But if you are talking about a hundred carloads, the equivalent of a hundred carloads, you might, in order to speed the shipment within a limited period of time, find it desirable from the service standpoint to split the shipment.

"And, in appraising that, you would have another factor: How fast can the facility itself load? Are all the commodities covered by the shipping order stored in the same place? Obviously in large shipments,

they can't be, so you might have that problem. So, it's pretty hard, unless you are talking about a specific shipment and analyzing a specific shipment, to give you a clear-cut answer."

11,781 "BY MR. BALL:

"Q. Nevertheless, the fact is, if I understand what you have, said, that over a period of time an attempt would be made to equalize?

"A. To distribute the traffic to the carriers by all modes that provided service.

"Q. Now, do you know of your own knowledge where the records were kept by the people in charge of routing that recorded for their own information the course of shipments so that they could apply the policy of equal division?

"A. They most certainly were.

"Q. Do you have any recollection or knowledge, yourself, of the form which that record keeping was undertaken by your subordinates?

"A. Well, they maintained a record of shipments routed by the various competing carriers. As I have previously stated, it is simpler in the case of rail carriers, because there are less of them. There is a complete docket kept of carloadings by the various railroads.

"Q. And those documents were used, in turn, in the application of this policy?

"A. They most certainly were and I have personally reviewed them on occasion.

11,782 "Q. Did you personally, at any time, ever hear of any complaints about the application of this policy of division made by any carrier?

"A. Oh, yes, constantly, because I must remind you that the term is 'equitable distribution,' and that makes it clearly a matter of opinion and I had complaints from every form of carriage and I think I could possibly, with reasonable accuracy, state every carrier involved that my judgment or my people's judgment for which I accept full responsibility wasn't entirely equitable from their point of view. But the problem was, in large measure, influenced by the fact that there just wasn't enough business to keep everybody busy.

"Q. What is the fact as to whether or not you, in your personal investigation of such complaints, came across instances where there had been --

"A. Most of the complaints were not what I would term a serious complaint of a specific, wrong doing. They were general allegations and I had frequent calls from people in all forms of carriage and we discussed it in, I would say, friendly terms. They recognized the problem that the Army had and I, in turn, recognized the problem that they would like to have more business.

11,783 "Now, there were undoubtedly of record, specific complaints as to specific unfair treatment and those were all investigated. But, to try and go back now and recollect those things, I can't be of any assistance, frankly.

"Q. But there were complaints you found justified and corrective action was taken?

"A. On occasion, yes. We found instances where we felt that there had not been a completely fair treatment of the carriers involved and those were adjusted; but, again, I couldn't cite for you a specific case.

"Q. Were you, yourself, personally solicited by representatives of any of the carriers or forms of transportation for a change in routing or allocation of traffic?

"A. No, those things were all settled in the Traffic Division itself and it would only come to my personal attention if there was a case of an allegation of unfair treatment of any specific carrier.

"Q. Do you recall either the representatives of the railroads or of the motor carriers attempting to deal directly with you on allocations?

11,784 "A. I have no recollection of any specific solicitation. The Army had very stringent rules, I believe, on solicitation. They had one day for the solicitors' calls on which they endeavored to listen to any solicitation. Now, that solicitation is not the type of commercial solicitation, normally, but rather is a change of facilities or something of that type where the traffic solicitor would point out that they had increased their capability or they had an improved service and he was tendering what would then amount to a change in their facility file. But the Army has, and very properly, always resisted any attempt at specific solicitation.

"Q. What is the fact based on your own recollection or knowledge as to whether such solicitation came from all forms of transportation or was concentrated within any one particular form of transportation?

11,785 "A. No, I think if you looked over the docket in the Chief of Transportation's office, and now the Military Traffic Management part of it, you would find that they have a record of solicitations that have been there and I am sure you would find every form, air and barge included, on which they have had visits from people discussing -- being what could be termed a solicitation call. There would, obviously, be more change in facility reports in the motor carrier industry because it is changing more rapidly and the carriers capabilities are changing more rapidly than would normally be the case with respect to rail transportation.

"Q. Do you have any recollection of any approach made to you by any representative of the Association of American Railroads with respect to the allocation of munitions traffic?

"A. Not from the Association itself, certainly. There is a unit of the A.A.R. right in the office of the Chief of Transportation, but their function is not one of traffic solicitation. It is an element of the car service division of the A.A.R. and their mission is that of supplying cars. Never, in my experience, did they ever step over the bounds and get into the solicitation business. They were purely in the service business.

"Q. Do you recall of your own knowledge any solicitation that was made for the allocation of munitions traffic by any representative of the Traffic Executives Association of Eastern Railroads -- TEA?

"A. No.

11,786 "Q. Do you recall of your own personal knowledge any solicitation for the allocation of munitions traffic made by the Eastern Railroad Presidents' Conference -- the ERPC?

"A. No.

"Q. Do you recall of your own knowledge any solicitation made for the allocation of munitions traffic by the Western Traffic Association, the WTA?

"A. No.

MR. BALL: Dropping down, now, Your Honor:

"BY MR. BALL:

"Q. Do you recall of your own knowledge any solicitation made for the allocation of explosives' traffic by the Southern Freight Association?

"A. Neither one.

* * *

11,790 "Q. Do you have any recollection of the somewhat general reductions that were made by certain of the railroads with respect to Section 22 Rates on ammunition and explosives in October of 1955?

"A. Yes, I remember when the new Section 22 rates were filed by the Eastern carriers.

"Q. Will you state what your recollection, your personal recollection is as to the occasion for the making of such rates and what prior discussions concerning such rates may have been had between the Transportation --

11,791 "A. There had been discussions going on between the Transportation Corps and the various rate conferences of the railroads for a good many years in an attempt to obtain a reconsideration and a lowering of the charges effective by rail. This was only the fruition of a discussion that had been going on for a long time.

"Q. Now, again, was Colonel Flanagan, to your knowledge, active in such discussions?

"A. He was. He headed up the presentation to the various rate-making conferences.

"Q. And what other members of the Transportation Corps were active in that effort to seek lower quotations from the railroads for the traffic?

"A. Colonel Flanagan and his immediate superiors in the chain of command were all involved in it as were the people in his section of the office who had prepared all these orders.

"Q. Were you personally made acquainted with the substance of Colonel Flanagan's presentations to the various railroad rate bureaus?

"A. To a considerable degree.

11,792 "Q. You had advance --

"A. Now, when I say that, I am talking about the basis of his presentation to the rate-making conferences.

"Q. That study was both on an over-all basis -- well, what is the fact, according to your recollection, whether that study was made on an overall basis or was it made region by region?

"A. Frankly, I cannot answer that. I don't recollect just exactly what form it took now.

"Q. What is the fact as to whether or not Colonel Flanagan's studies were presented to you in written form?

"A. They were in written form.

"Q. And what is the fact as to whether or not you had also conferences with Colonel Flanagan and his immediate superiors on that subject?

"A. We had many conferences on it and I followed his progress in preparing his study and it was also a matter for consideration before the Transportation Council of the Department of Defense of which, as Chief of Transportation of the Army, I was a member, because the study actually was made in the name of the Department of Defense. It was done by the Army because they were the biggest freight shippers and because they, generally speaking, have primary cognizance of surface transportation -- by land.

11,793 "Q. Will you identify this council that you have mentioned in the Department of Defense?

"A. The coordination amongst the services, Army, Navy, Air Force, within the Department of Defense, was effected through a council consisting of a representative of the Secretary of Defense and the three

service chief transportation officers -- one from each of the three services, with a Marine Corps officer sitting in when anything affected the interest of the Marine Corps.

"Q. Can you, from your recollection, identify the representatives of the other services that sat with you when you were on that?

"A. Chief of the Bureau of Supplies and Accounts for the Navy and the Director of Transportation for the Air Force, the Quartermaster General of the Marine Corps when they had any interest.

"Q. This may be repetitive, but I want to be sure of this:

"What is the fact,to your own recollection, whether specific efforts had been made on the part of the staff of the Transportation Corps to secure lower rates from railroads prior to October, 1955?

11,794 "A. It had been going on for a great many years. I couldn't give you the specifics as to when it started, but it had extended over a period of quite a few years.

"Q. What is your recollection as to whether or not you found those studies in existence and those efforts being made at the time you became Deputy Chief of the Transportation Corps?

"A. They had been going on long before that. They hadn't reached the finalized form that Flanagan made of them. After all, you are talking about the term of one officer in Washington and this far exceeded one officer. It had been going on for a long time until finally brought into focus in one study by Flanagan.

"Q. What is the fact as to whether or not those efforts ceased with the rate reductions made by the Eastern Railroads in October, 1955?

"A. We endeavored to obtain similar rate reductions from the other conferences, rate-making conferences of the railroad industry.

"Q. Did you make any -- did you or did you not make any further efforts with respect to securing even lower rates from the Eastern Railroads subsequent to that time?

11,795 "A. I have no recollection of any attempt to secure further reductions from them.

"Q. But you did --

"A. Our attempts were to bring about a full consideration by the other rate-making groups.

"Q. And now, whether you were or were not successful in that?

"A. I could not tell you the -- there were some successes. At this time, I could not tell you just how they were divided between Southern, Western, Southwestern, and so forth.

"Q. What is the fact, according to your recollection, whether, in checking these, you dealt with the railroads collectively or with --

"A. We always dealt with the railroads collectively on rate-making matters. We deal with the rate-making groups. The only occasion we would ever have to go to a single railroad would be where it pertained to a spot type of rate in which only one railroad was involved, but the normal pattern of dealing on all the services has been to deal with the Associations, not with individual carriers.

"Q. By 'the Associations,' you mean --

"A. Of all forms of transportation, motor carrier -- the same as we did with the rate making conferences of the railroads."

11,796 MR. BALL: I did not intend to read any further. I will do so if you wish.

THE COURT: If counsel wishes to read any further, you may do so.

MR. WRIGHT: I think certainly the next question and answer should be read.

THE COURT: How about the next question and answer?

MR. BALL: All right. (Reading):

"Q. Do you recall having any dealings on rates directly with the Munitions Carriers' Conference?

"A. I had no dealings with them. In fact, it would be my recollection that the conference itself was not a rate-making conference.

"Q. Now, I would like to identify -- by the rate making organizations of the railroads, you refer to the Traffic Executive Association, Eastern Railroads?

"A. Well, the Southern Freight Association and so forth.

"Q. And the Western Traffic Association?

"A. And the Western Traffic Association.

"Q. And the subdivisions of those agencies?

11,797 "A. That's correct.

"Q. You don't have reference to the Eastern Railroad Presidents' Conference?

"A. No, no. I am talking about the rate making units of the representatives of the railroads which are recognized under section 5A, I believe."

MR. BALL: That's all.

Do you want more?

MR. WRIGHT: No, I don't think we need any more of the direct.

There is cross examination by Mr. Bridgeman, though.

* * *

11,798 "EXAMINATION BY MR. BRIDGEMAN:

"Q. Shall we go on?

"A. Go right ahead. Keep rolling here."

MR. BALL: May we come to the bench?

THE COURT: Yes.

(Thereupon counsel for the parties approached the bench, and conferred with the Court as follows:)

MR. BALL: I wondered what portions you intended to read.

Will you repeat that again, Mr. Ball, please?

MR. BALL: Most of Mr. Bridgeman's cross examination was on a different subject. I think you were equally out to discover what you could, and I don't think it has any reference to these rate negotiations particularly.

There is a page or two of further qualifications of the General, but I just wondered what there was that you had in mind that was relevant to the rate problem.

MR. BRIDGEMAN: I certainly thing, as I recall, when I went out there, I attempted to keep my cross examination as closely related as possible to what the direct examination was.

THE COURT: Then is there any use to read any of the rest of it?

MR. BRIDGEMAN: Yes, I think so.

THE COURT: You think so.

11,799 MR. WRIGHT: I don't understand, your Honor. We would be entitled obviously to the benefit of cross.

THE COURT: If it went into other matters?

MR. BALL: I recall he was talking, when we got over here, about whether they heard about the publicity and factors like that.

THE COURT: That's what I mean, did you go into publicity and all that?

MR. BRIDGEMAN: Only in so far as it related to the direct examination.

I recall one item of publicity which was a quotation from the "RAILWAY PROGRESS," or I forget what publication it was, but a statement was made that Section 22 rates --

MR. BALL: I wonder if it would not be well -- you see, we gave a list of the exact pages to counsel last night -- if we could have an indication of exactly what they wanted from this now.

THE COURT: It is a quarter of four now; why don't you go through this first?

MR. WRIGHT: It seems to me the proper procedure, when they say so, Your Honor, is that we would normally ask the cross examination questions, and if Mr. Ball has any objection to a question as not being cross examination, I suppose he can make it.

11,800 THE COURT: Let's go ahead and we will make them as we go along.

(Thereupon counsel resumed their places at the trial table and the following occurred:)

THE COURT: What page were we on?

MR. WEST: Page 37. I just read line 3.

"BY MR. BRIDGEMAN:

"Q. All right. General Yount, can you describe precisely what your functions were as Chief and Deputy Chief of Transportation?

"A. Well, to implement the functions of the Transportation Corps which, I would state, is to procure and provide all transportation required world wide by the United States Army. That's a mouthful, but --

"Q. I take it that a part of the Transportation Corps function was to deliver it safely to its destination?

"A. That's correct, any place in the world.

"Q. Now, you made some reference to the fact that prior to August, 1952, you had been in Korea?

"A. That's correct.

"Q. How long had you been there?

"A. In Korea 15 months.

11,801 "Q. What was your position in Korea?

"A. Commander, Second Logistical Command.

"Q. Was the 'Second Logistical Command' descriptive of a geographical area?

"A. No, It had a geographical area, all of Korea behind the Corps rear boundaries, but it was the supply transportation -- both are included in the term 'logistics' -- it was the Supply Transportation Agency of the Eighth Army.

"Q. Did the function of supply and transportation include the supply and transportation of ammunition and explosives?

"A. Indeed, it did.

"Q. By what means of transportation was that performed?

"A. Both by rail and by truck, even, on occasion, by air.

"Q. Air drop?

"A. Air drop, yes.

"Q. You would drop ammunition and explosives to the troops by air?

"A. Yes.

"Q. Again, I ask the question whether the fulfillment of your mission required the safe delivery of supplies including ammunition and explosives?

11,802 "A. It certainly did.

"Q. Are you familiar with the actual technique of loading and unloa ing ammunition and explosives on military trucks for delivery to troops for use?

"A. If you are talking about the actual loading rules, the answer would be I am not an expert on loading rules.

"Q. No, sir, I am speaking of the actual practice of truck companies, or whatever the appropriate term is that applies at this time, in the loading, for instance, of, let's say, 105 shells on trucks?

"A. Yes.

"Q. And unloading. Can you describe how that would be done?

"A. Well, a 105 shell comes in a fiberboard container and they are banded in units and loaded like any other piece of freight.

"Q. Those are high explosive shells, are they not?

"A. '105 shell' covers anything, phosphorus, high explosive, armour piercing.

"Q. Have you had experience, personal or by observation, with the unloading of shells of that sort of munition?

11,803 "A. Not right at the guns, no. I don't think I ever watched them unload ammunition right at the firing point.

"Q. Now, in respect to direct examination by Mr. Ball, you gave some testimony as to the equal division of traffic between modes of transportation under certain circumstances. Now, can you describe precisely what factors would dictate the actual division?

"A. If all conditions of service and cost were identical, time in transit would be one factor.

"Q. Now, with respect to that, can we term that 'speed' for shorthand purposes?

"A. Speed, speed of delivery.

"Q. Yes. Where speed was a factor, rates would recede, is that correct?

"A. Yes.

"Q. For example --

"A. In meeting a deadline, speed became the determining factor, the primary factor, and economy had, of necessity, to become a secondary factor.

"MR. BALL: Mr. Bridgeman, may I interrupt?

"MR. BRIDGEMAN: Surely.

"MR. BALL: Speed would only be a factor, however, in those cases where time was of the essence?

11,804 THE WITNESS: That's correct. Where, for instance, you might have a specific type of shell or fuse in short supply and you were endeavoring to make a ship's sailing. Normally, your orders are far enough ahead that the time of delivery does not become a primary consideration.

"MR. BALL: That's what I was after. Thank you.

"BY MR. BRIDGEMAN:

"Q. Did it frequently occur that where speed was a factor you woul utilize truck rather than rail service despite a higher truck rate?

"A. I have no specific recollection of such a condition, but I am sure that if one searched, he could find it.

"Q. What other factors were involved other than speed?

"A. The question of the capability of the shipping and receiving facilities, which I have already covered.

"Q. You are referring now to the presence or absence of rail service or of motor facilities?

"A. Tracks or roads to the storage points, the igloos at the storage point and also the particular terminal facilities to which it was being consigned. If it was overseas, did the out shipping point have comparable facilities for both rail an truck.

11,805 "Q. For instance, where there was no rail service to igloos, how would you transport ammunition and explosives to those points?

"A. Normally, we would have selected highway transportation, assuming -- obviously, the igloo has to be served either by one or the other or both forms of transportation.

"Q. Were there situations where a particular installation would have rail service but not to the igloos?

"A. Yes, there were such instances.

"Q. And what form of transportation would be used in such cases?

"A. Normally, we would attempt to use motor carrier transportation.

"Q. Was there not, General Yount, a Defense Department regulation in effect during your tenure as Chief and Deputy Chief of Transportation, which prohibited rail service to certain installations, in a Department of Defense directive, a commercial traffic bulletin?

"MR. BALL: Will you describe what --

11,806 "A. (Interrupting) A commercial traffic bulletin is really, in part, a facility description, and certain commodities are prohibited for delivery by rail or by truck to certain facilities. It is a pretty voluminous affair considering the number of military installations in the United States. And the commercial traffic bulletin really sets up the facilities of these various -- it probably is poorly stated to say 'it sets up the facilities,' but it informs transportation officers of any limitations at the installation to which he is shipping.

"Q. And was it not true that in some instances, one of the limitations would be against rail transportation of explosives?

"A. Yes, there are limitations against rail transportation to certain facilities.

"Q. Do you know what the reasons are for that sort of limitation?

"A. Generally, I would say they had to do with the -- again, with whether the storage area was land served directly.

"Q. Well, if the storage area itself were not directly served by land, but some point in the installation was, was it not true that there were still, in many cases, prohibitions --

11,807 "A. Yes, there were. In some instances, the rail head was at a populated section of the post in which the rehandling would have had to have occurred in a populated area of the post. In those particular instances, rail service would have been prohibited. Now, you are really addressing yourself, in large measure, to the posts, camps, and stations which was the training ammunition as opposed to the movements for export.

"Q. Yes, but there were, nevertheless, movements to these places?

"A. Oh, yes, constant movements, obviously, for training purposes because any installation with a combat unit is going to be a consumer

of ammunition for the training of the men.

"Q. Now, would it be true that safety would be a factor in considering this matter of equal division between modes of transportation?

"A. I'm not sure that we understand each other as to how you are applying safety. Obviously, it would be unwise to handle ammunition next door to the post commissary. That would be a safety matter, and we would not do it.

"Q. Well, do you have a term that you prefer to use for that sort of situation?

11,808 "A. Well, certainly, in relation to safety -- I mean it is a safety problem there because with all the precautions in the worl . ammunition is still a dangerous item and you would take no -- you would leave no stone unturned to do it in a safe fashion."

* * *

11,838 DIRECT EXAMINATION OF MR. BIRK BY MR. WHEELER

Q. Mr. Birk, will you please state your name, address and present occupation?

A. My name is George W. Birk, B-i-r-k. I reside at 6115 E. St. Joseph St., Indianapolis, Indiana.

My present employ is Assistant General Manager of the Southern District of the New York Central Railroad.

Q. Mr. Birk, will you please describe your background and experience in the transportation field?

A. I was first employed by the New York Central Railroad as a yard clerk in 1918. And later I served an apprenticeship in the mechanical department.

After that I attended Purdue University, where I received a degree in engineering, working for the railroad during vacation periods.

After receiving my degree, I was appointed as Special Engineer in the Transportation Department, assigned to yard and road operations.

Later I was promoted to Assistant Air Brake Supervisor, Lubrication Engineer.

Then I was transferred to Buffalo, New York, as Supervisor of Locomotive and Fuel Performance, where we had the assignment of making full utilization of our yard power, road power, resulting tonnages to be handled on each division on our system.

11,839 Later, I was transferred to New York on the staff of the Operating Vice President and a special assignment in the Transportation Department.

Later, I was appointed as a Superintendent, then back to New York again as a special assignment on the Operating Vice President's roll.

And then I became General Superintendent, and on my present assignment, Assistant General Manager, which I hold at the present time.

Q. How many years have you been with the New York Central System?

A. Forty-one and a half years.

Q. You have worked on various parts of that System?

A. I have worked on every district on the New York Central System.

Q. Now, in your present position, what portion of the -- first of all, Mr. Birk, supposing you tell us where the New York Central System operates, by reference to the map which is on the easel beside you.

A. Well, we operate in what is known as Official Territory. We operate in 11 states and Canada.

We start out in Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Missouri, Kentucky, and West Virginia.

The Official Territory is made up of both the Eastern District and the Pocahontas Region and we operate in the Eastern, Pocahontas Territory.

11,840 Q. Can you indicate with your hand where on the map this Official Territory to which you have referred, is located?

THE COURT: Do you have a pointer? There is one for the witness to use.

THE WITNESS: Thank you. The Official Territory extends from the Atlantic Coast Line along the Canadian borders to the Great Lakes Region, along the Western Shore of Lake Michigan, down to Peoria, Illinois, and then to St. Louis, and across to the mouth of the Ohio River, up through Cincinnati Gateway, across Kentucky, the northern border of Kentucky, and the northern border of North Carolina and back to the Atlantic Ocean.

And that is the territory in which we operate.

Q. Mr. Birk, was that territory established by the Interstate Commerce Commission?

A. It is.

Q. Official Territory?

A. It is.

Q. Now, will you indicate the portion of the New York Central System, the operations of which you are presently responsible for.

A. My territory covers the states of Ohio, Michigan, Indiana, Ohio, Kentucky, Missouri and West Virginia.

11,841 Q. I don't believe you mentioned Illinois.

A. And Illinois.

Q. Are you generally familiar with railroad operations in the Official Territory, Mr. Birk?

A. I am.

Q. Have you had any experience in the transportation of explosives by railroads during your years of service with the New York Central?

A. I have had considerable experience in handling explosives in the various territories in which I have worked on the New York Central.

Q. And those territories are within Official Territory, is that correct?

A. They are.

Q. I believe you stated that includes the so-called Eastern District and the Pocahontas Region?

A. Yes, we operate in both the Eastern District and the Pocahontas Region.

11,842 BY MR. WHEELER:

Q. Now, have you made a study of the handling of explosives in official territory for this --

A. Yes, I have.

Q. What year or years did your study cover?

A. The study covered the year of 1956 which was the first full year in which the reduced rates had been in effect. However, basically the operation for handling explosives is the same. I could use any one of the years from 1955 up to and including the present time.

Q. Do railroads handle explosives in the same manner as they handle other commodities?

A. No. Explosives are considered as dangerous and there are regulations set up covering their particular handling.

Q. Who issues those regulations, Mr. Birk?

A. The Interstate Commerce Commission set up the Bureau, and the Bureau of Explosives which has the regulations for covering the handling of dangerous commodities and explosives as well.

Q. Are you familiar with those regulations?

A. Yes, I am.

Q. Are those regulations, with respect to the handling of explosives, applicable to all railroads in Official Territory?

11,843 A. They are.

Q. Does the New York Central instruct its employees in the handling of explosives and other dangerous commodities?

A. Yes, we have held classes for a number of years on the handling of explosives and we handle the regular rules classes. We also have little pamphlets put out by the Bureau of Explosives which are distributed to the various classes of employees who handle dangerous and explosives commodities, such as yard clerks, yard masters, train masters, crews, and so forth. We also have posters which have excerpts from the Bureau of Explosives Bulletins. They are posted in the yard offices, places of congregation where crews go on and off duty, and in caboose cars.

Q. To your knowledge do the other railroads in the Eastern Territory have similar programs for the education of employees on the handling of explosives?

A. Yes, from my visits to the other yards in the Official Territory, and other territories as well, I have observed the placards posted in the yard offices, and also in cabooses on the other railroads.

DEPUTY CLERK: No. 15 Defendant Chesapeake and Ohio's exhibit No. 22 for identification.

(No. 15 Defendant Exhibit No. 22 being copy of placard placed in C & O yard office, on Caboose cars, etc., marked for identification.)

11,844 BY MR. WHEELER:

Q. Mr. Birk, I hand you what has been marked for identification as C & O exhibit 22. Will you please state what that purports to show.

A. This is a copy of the placard which was posted in the yard offices, in the caboose cars and places of congregation where various classes of employees go on and off duty, entitled "Excerpts from the Interstate Commerce Commission Regulations for Transportation of Explosives and Other Dangerous Articles by Freight, Applying to Handling of the cars, Explosives-Dangerous, Poisonous Gas and Dangerous Classed-poisons." It contains on here the excerpts from the tariff which is used for handling explosives.

MR. WHEELER: Your Honor, I now offer in evidence what has been marked for identification as C & O Exhibit 22.

THE COURT: Any objection?

MR. WRIGHT: No objection.

THE COURT: It may be admitted.

(No. 15 Defendant Exhibit 22 is received in evidence.)

BY MR. WHEELER:

Q. Mr. Birk, then is exhibit 22 the same or substantially the same as that poster was as published in 1956?

11,845 A. Basically it is the same. There has been some minor revisions as new developments have come along and different classes of commodities being handled. For example, poisonous gases, dangerous-classed poisons and along that category.

11,845 Q. So far as ammunition and explosives is concerned, it is the same?

A. Basically the same.

Q. Mr. Birk, would you please describe the special precautions that the railroads are required by the regulations of the Interstate Commerce Commission to observe in the transportation of a carload of explosives?

A. Under Campbell's Tariff, from which these excerpts were taken, we have a definite outline that must be followed in selecting cars for explosives loading. First we select as Class-A Car, which is our better class of box car. This car must be not less than 80,000 pounds capacity. It must be equipped with the steel underframe, a friction draft gear, air brakes, hand brakes, and, of course, all the safety appliance requirements that are required on any type of cars used in Interstate Commerce.

Q. You mentioned it was a box car. I assume by that it has to be a closed car?

A. Closed car, that is right.

Q. Mr. Birk, would you please tell us what the purpose of a friction-draft gear which you mentioned, is.

A. A friction draft gear is the spring-loaded device that is used for attaching the draw-bar or draft rigging to the underframe of the car. It is a shock-absorbing device to absorb the shock and selection and all in normal handling.

11,846 Q. Would you please continue with your description of the precautions which you take pursuant to the ICC regulations.

A. After a Class A Car has been selected, we make a thorough inspection of the car, examining the wheels, the underframe of the car, the

brake-rigging, the springs under the car, the hand brakes, the side ladders used for getting up to the top of the car, the journal boxes -- they must be --

Q. What is a journal box?

A. A journal box is the portion of the side frame of a car that houses the axle or bearing portions of the axle on which a bearing is placed and a wedge on top of that to keep the bearing in place, the lower portion of the journal box is used to contain the lubricant which supplies the lubricant to the journal by means of waste packing, or at the present time we are using pads. That lubricant goes up to the journal by wick action. In some cases we have rolling bearings on freight cars.

Q. Are journal boxes the things that a man goes down the line and pulls open for inspection?

A. Yes, there is a lid on the outside of the box where the inspector goes along and opens the lids, making the inspection before the train departs. This lid is closed to keep out any dirt or foreign material from getting in.

11,847 Q. Are there any further steps in pre-loading inspection, Mr. Birk?

A. Yes, the car must be an absolutely tight car. After the outside of the car has been thoroughly examined, the running board and the doors are fitted up properly, the proper locks and hasps are on the doors, then the inspector gets inside the car and the doors are closed by an additional inspector to see that there is -- the car must be free from any entrance or expansion that may cause a fire. Then he inspects the interior lining of the car, the floor of the car to be sure there is no decayed spots, any metal, projecting straps, or nails protruding out from the outside of the car that might cause damage.

Also, in some types of box cars, closed type cars, the center pin or kingpin which holds the truck to the body of the car, was covered by a metal plate. If they are, those must be covered by wood before we present the car for loading of explosives.

Q. Do you clean the car in any way, Mr. Birk?

A. The car is thoroughly cleaned either by blowing out with compressed air, or steam, and in most cases the cars are washed.

11,848 DEPUTY CLERK: No. 15 Defendant, the Chesapeake & Ohio Exhibit No. 23 for identification.

(No. 15 Defendant Exhibit No. 23, No. 10M 8-54 WSG, "Car Certificate" was marked for identification.)

BY MR. WHEELER:

Q. Mr. Birk, I hand you what the Clerk has marked for identification exhibit No. 23 for identification and I ask you to state what that purports to be.

A. This is known as the "Car Certificate" which must be signed by the inspector who makes the inspection on the car. It reads as follows:

"No. 1. Station location " Shall be identified where the car has been serviced, the date.

"I hereby certify that I have this day personal examined Car No. (blank), that the roof, sides and ends have no loose boards, holes or cracks, or unprotected decayed spots liable to hold sparks and start a fire; that the kingbolts and draft bolts are properly protected and that there are no uncovered pieces of metal or nails projecting from the floor or sides of the car which might injure packages of explosives; also that the floor is in

good condition and has this day been cleanly swept before the car was loaded; that I have examined all the axle boxes and that they are properly covered, packed and oiled, and that the air brakes and hand brakes are in condition for service."

11,849 And this is signed by the inspector who performed these operations.

Q. Is the car certificate which has been marked for identification as C & O Exhibit 23, the same or substantially the same as that that was used in 1956?

A. It is.

MR. WHEELER: Your Honor, I offer in evidence C & O Exhibit 23.

THE COURT: Any objection?

MR. WRIGHT: I beg your pardon?

THE COURT: Any objection?

MR. WRIGHT: No.

THE COURT: It may be admitted.

(No. 15 Defendant Exhibit No. 23 is received in evidence.)

BY MR. WHEELER:

Q. Where is this certificate placed after it is signed, Mr. Birk?

A. After the car has been thoroughly cleaned and this certificate has been signed by the inspector, this is made out in triplicate and is tacked on the inside of the car, after which the car doors are closed; sealed, and the car is ready for movement to the arsenal.

11,850 I have a sample of the seal here if you would like to see the type of seal that is used. This is a car seal that is put on the car, to fasten the car.

Q. Do you have any more of these?

A. I have one (handing to counsel.)

Q. Are any further inspections made of the railroad car before it is loaded with explosives, Mr. Birk?

A. Yes, the cars move to an arsenal or loading point where another inspection is made by a government employee before the car is loaded.

Q. Now, the government employee is one that is authorized to break the steel seal and enter the car to inspect it further, is that correct?

A. That is right.

Q. Now, who did you say makes the inspection at the government arsenal?

A. The government employees make their inspection of this car before they load it.

Q. Now, is he required to keep the car on the basis of your inspection?

A. No, often times we will find that we have one car or two cars maybe out of a lot that are rejected. We have found cases where an oversight has been made in covering up the kingbolt cover with wood. Sometimes we find a few nails projecting from the side of the car, and occasionally they will reject a car.

Q. Would you please describe the handling of a car after it has been accepted for loading by the Government Inspector at the arsenal?

A. After the car has been accepted by a Government inspector, it is handled by the Government inside the plant up to a loading platform for loading of the commodity which they expect to ship.

THE COURT: Excuse me, Mr. Wheeler, and Mr. Wright, will you come to the Bench a minute?

(At the Bench.)

THE COURT: Mr. Wright, it seems to me that, if I would read this second paragraph to the jury, it would give them an idea just what the defendant is trying to develop. I think the second paragraph is the important part of it.

MR. WHEELER: Fine.

THE COURT: You may not have a copy. I will read it.

"Defendants expect that their prospective evidence will consist of (1) testimony by G. W. Birk, of the Defendant New York Central, J. J. Mahoney, formerly of Defendant Santa Fe, and possibly John Stewart of the Defendant Milwaukee, and others, who will describe generally the
11,852 operating conditions under which explosives traffic moves, all as a necessary predicate for testimony by Walter B. Wright, an expert cost analyst of the Defendant C & O, who, after taking into account the operating conditions described by the prior witnesses will testify as to the costs incurred by the railroads in transporting government explosives traffic. The results of Mr. Wright's study on such costs has been incorporated in proposed exhibits which were provided to the plaintiff on May 12 of this year. The comparison between costs and rates will show that the rates were compensatory to the railroads."

That is not necessary. I just wanted to give them some idea and purpose of the testimony. Any objection?

MR. WRIGHT: No objection. So far as foundation is concerned, he would proceed directly to Mr. Wright without this.

THE COURT: I suppose you want to lay a foundation of your cost expert as a witness.

MR. WHEELER: We have to.

11,853 THE COURT: That paragraph concludes with "The comparison between costs and rates would show that the rates were compensatory to the railroad."

Now, that is what they are going to try to show. If you have any objection, I will not read it. I just wanted to show the contention of the defendant here.

MR. WRIGHT: No objection.

I suppose it is only fair to say, unless I make the objection myself, the plaintiff contends this is immaterial.

THE COURT: That is right.

(In open court.)

THE COURT: Now, ladies and gentlemen of the jury, so that you will be better able to follow this testimony and have in mind the purpose and the reason why this witness, Mr. Birk and other witnesses, will be presented for your consideration, the Court will at this time read you the second paragraph of a memorandum submitted to the Court by counsel, by Mr. Wheeler, which will give you a brief summary of the purpose of these witnesses testifying, so that you will be better able to follow the testimony.

Now, in this memorandum, paragraph 2, the defendant through Mr. Wheeler, states:

"Defendants expect that their prospective evidence will

11,854 consist of (1) testimony by G. W. Birk, of the Defendant New York Central, J.J. Mahoney, formerly of Defendant Santa Fe, and possibly John Stewart of the Defendant Milwaukee, and

others, who will describe generally the operating conditions under which explosives traffic moves, all as a necessary predicate for testimony by Walter B. Wright, an expert cost analyst of the defendant C & O who, after taking into account the operating conditions described by the prior witnesses, will testify as to the costs incurred by the railroads in transporting government explosives traffic. The results of Mr. Wright's study on such costs has been incorporated in proposed exhibits which were provided to the plaintiff on May 12th of this year. The comparison between costs and rates will show that the rates were compensatory to the railroads."

That is the purpose of this evidence.

MR. WHEELER: I am not sure where I was. Would you read me the last answer of the witness, please?

(The reporter read the record.)

THE COURT: Ladies and gentlemen of the jury, maybe I should summarize briefly the contention of the parties.

11,856 In opening statements I think Mr. Ball and other counsel went into this; they contended the evidence will show that the rate reduction issue which we have been listening to for some days, was not an act pursuant to a pre-existing conspiracy on the part of any one or more of the defendants. The defense in this case is that this rate reduction which was put into effect in October of 1955, and in March of 1956, and I think in April of 1956, was a rate reduction which was put into effect, they claim it was a lawful rate reduction and they have submitted and introduced testimony to try to convince you, at least, that so-called pressure was put on the railroads by the Defense Department; you remember all of that. And the defendants contend that this rate reduction which we are talking about now was a rate

reduction which was compensatory to the railroads.

In other words, it was not part of a conspiracy or a pre-existing conspiracy or an overt act or an act in furtherance of a conspiracy.

On the other hand, the plaintiff contends it does not make any difference whether the rates were compensatory or not, if this rate reduction was put into effect pursuant to the pre-existing conspiracy -- if you find that a conspiracy has been proven --that this rate reduction was put into effect pursuant to that conspiracy and for the purpose of limiting the plaintiff instead of for the purpose of meeting the competition of the plaintiff -- then it would be a violation of law.

11,857 Now, that is the simple issue of the case. All of you, I think are well aware of that. After all of the evidence is in, and at the proper time, the Court will give you what it thinks is a proper instruction of law applicable to that.

MR. BALL: May I approach the Bench?

THE COURT: Yes.

(At the Bench.)

THE COURT: Do you have any complaint about that?

MR. BALL: Just one phrase.

You see, what we contend is not only that this was put into effect to meet competition, but that it was putin in order to retain the business that was threatened to be taken away from us.

THE COURT: I understand.

Further than that the defendants contend that this rate reduction was not only put in for the purpose of meeting competition, but was put in for the purpose of retaining the business. I think that is the suggestion you made, correct?

MR. BALL: Yes.

THE COURT: All right, I think you understand clearly now the issue.

11,858 (In open court.)

BY MR. WHEELER:

Q. Mr. Birk, after a car is loaded, is there a further inspection of the loading?

A. Yes, there is.

Q. Would you please state what that is?

A. After the car has been loaded, we are notified by the loading people for an inspection on what is known as a pre-movement inspection. What this inspection entails is the inspector looks over the car again to be sure that the load is loaded properly in the car, is properly blocked and braced, and that the car doors, after the load has been inspected are properly closed and sealed: That the placards are placed on the car, two on each side and one on each end, and that the car certificates are also tacked on the tag board on the sides of the car. The cars must be properly sealed before they are moved.

11,859 Q. Mr. Birk, you referred to the car certificate. Was that C & O Exhibit No. 23?

A. Yes, sir. There are two portions to that certificate: There is No. 1 and No. 2. The bottom portion is known as No. 2. That certificate must be signed by both the railroad employee making the inspection and the government inspector or the loading man, at the dock where the car is loaded.

Now, there are three of those: One of them is taken back to the billing point from which the car will move. The other two are placed one on each side of the car.

Q. After the inspection is completed, what is done with the car?

A. The car is then handled down to an interchange point where it is given to the railroad for either a switch move into the yard or a line haul move into the yard.

Q. I believe I overlooked something, Mr. Birk. You referred earlier to a placard.

DEPUTY CLERK: Government exhibit C & O Defendant 24 for identification.

(Defendant No. 15, C & O Exhibit 24, Placard titled "Explosives, Handle with Care; Keep Fire Away" is marked for identification.)

BY MR. WHEELER:

Q. I hand you what has been marked C & O Exhibit No. 24 and ask you to state if that is the placard to which you refer?

A. That is the placard similar to one used in all types of cars handling explosives and it reads "Explosives, Handle With Care, Keep Fire Away" and then the station and the date, "And Condensed Rules for Handling this Car."

11,860 MR. WHEELER: Your Honor, I offer in evidence C & O Exhibit No. 24.

THE COURT: Any objection?

MR. WRIGHT: No.

THE COURT: It may be admitted.

(C & O Exhibit 24 is received in evidence.)

BY MR. WHEELER:

Q. Are all of the measures that you have explained to date, Mr. Birk, outlined in instructions issued by the Interstate Commerce Commission?

A. They are.

Q. Now, would you continue your description of the handling of the car after the car departs from the loading platform and the government arsenal?

A. The car is handled by the government engine from the loading platform down to a point where the car can be picked up by a road haul train or switch move. In some cases the interchange track is outside of the government fence. Sometimes they interchange the cars immediately inside the government fence.

MR. WHEELER: Your Honor, I would like the witness to come and draw us a little diagram of what he means by that if he can.

11,861 THE COURT: All right.

(The witness went to the blackboard.)

THE WITNESS: This is the main track of the railroad. This is the switch that leads up into an arsenal.

BY MR. WHEELER:

Q. You will have to speak louder, Mr. Birk.

THE COURT: Do you want to move down?

THE REPORTER: Yes, Your Honor.

THE WITNESS: This is the main track of the railroad. This is the spur that leads up into the arsenal. This is the arsenal fence - (indicating on blackboard.)

Now, in cases where it is delivered by the government engine outside of the fense, we bring the car out and spot the car in a location like that, to be picked up by the road-haul train.

We have other cases where we have a spur going into the plant, and have the fence, this is the gate here, incidentally (indicating), and this is the gate. Inside the fence they have tracks in here where the cars are interchanged. This is a small yard. The government engine in that case will bring the car into this location. A road engine will move into this area to pick up the car. However, I might state that when they move inside the fence, we had to get permission from the arsenal to move inside there and get someone down to open the gates.

11,862 These gates are closed at all times and we had to get someone to open them.

Now, also, before they moved in, in many areas, they take lighted cigarettes and strikable matches away from them before they let them go inside the plant.

BY MR. WHEELER:

Q. Mr. Birk, you referred to a road haul train. What kind of a road-haul train in normally employed in the pickup of a car of explosives at a government arsenal?

A. Normally, that is picked up by what we call the way freight or peddler freight job.

Q. Can you explain that to us?

A. Yes, sir. A peddler or way freight is a train that has the cars in station order when they leave a terminal, and they stop at Station "A", for example, and will leave cars and pick up cars at that particular station, move on to the next station maybe ten miles away, leave cars or pick up cars that are at that station, until they finally get into a terminal or turn-around point.

Q. When you spoke of stations, were you speaking of stations and/or industries?

A. It might be a grain elevator, for example. That is the only thing out in this area. We have empty cars going in for loading, or they have cars that have been loaded that they have in order to pick them up and they pick those cars up. That is what is known as a peddler job on a way-freight.

11,863 Q. As I understand it, a way-freight train then performs both a line-haul service and a switching service?

A. That is right.

Q. Now, would you please explain how the line-haul train picks up the explosives car at the inter-change point and moves it to the next point of interchange, Mr. Birk?

A. Well, we use this example here where the car has been delivered outside of the plant (indicating). The train will come into this area, in a series of cars. In order to pick that car up, he will make a cut-back, and hold on to sixteen cars and proceed up through this area down through here, up through here and back into this car, couple up, then he will back down through here and cut it back into his train.

Now, when this train in made up, you will have these cars and here will be the car of explosives in here (indicating) -- roughly the middle.

He must have, according to the regulations, not less than 16 cars between the locomotive and the caboose car which is on the rear end.

11,864 Q. You mean sixteen cars between the locomotive and the explosives --

A. He must have at least sixteen cars between the locomotive handling that car of explosives, and at least sixteen cars between the caboose

and a car of explosives, with one exception, if he has a way freight out here that does not have that many cars, he places it then in the middle of the train as near as he possibly can.

We try to in no case have less than six cars between the car of explosives and either the caboose or the handling locomotive.

Q. Now, Mr. Birk, after that way freight train picks up the car of explosives at the arsenal, where does it go next? Where does it take that car?

A. It takes it into what is known as the yard, for classification for movement to its destination.

Q. What kind of yards to you have?

A. Well, yards are normally classed in two groups: Flat switching yards and hump yards.

Q. Can you graphically portray on the blackboard a flat switching yard, Mr. Birk? If you do not have enough room, we can turn it.

A. I can do it up here (drawing on the board.). A flat switching yard is a series of tracks located on level ground on which cars are switched into their proper groups.

11,865 Q. What do you mean by "in their proper groups," Mr. Birk?

A. Well, a train comes into this area here, for example, and is mixed up, for the various destinations for which it is intended. When that train arrives in that yard, we have this yard engine which will go in and take hold of these cars and bring them back, drop them into, say, this is a Group 1 in here, this Group 2, this Group 3 and Group 4.

Those groups are designated by designations for the delivery of the car. The switch engine will come in and take over these cars, bring them down. Come down to, say, this is for Group 1, this is 3, this is 4, this is 2, this is one, this is 2 -- drawing on board.

Now, he will pull these cars back and shove in here -- this is 1, 2, 3, 4 -- he will shove No. 1 car down into here. The engine moves ahead until it gets enough momentum -- and we have a cut-off man to cut off that car -- and will roll down into this track and it is stopped by a rider.

Now, he will pull back, shove down again and have one for No. 3. So this switch will be open and the car will go into this track. So, he keeps up until he has all of these cars in the proper blocks in which they belong for outbound movement.

11,866 Q. What about that explosives car that we started with in the way freight?

A. That explosives car is located -- say this is the explosives car in here; what he will do is cut away from this car right here, leave one car behind him. He will classify these cars into the proper groups into which they belong.

Now, he will come back and get hold of this explosives car, with one car between the engine and this car, and move it down into this track here, where he will leave this car of explosives until he gets ready to cut it back into its proper group for dispatch to its destination.

Now, the way that is done, he will group these cars in a group. Now, he wants to put that car, say it belongs in group 3, and he has 20 cars in group 3 --

Q. Can you speak a little louder, Mr. Birk?

A. You see, this car goes into group 3, say. He has the groups made up, so he will come down into group 3 and he will pull back about half of those cars, come down and couple on to this car, come back and shove it in here, where now in the final analysis he has the car in there.

It is ready for blocking into a solid train for movement to its destination.

I might illustrate that by saying here is the train made up. Say this is group 4, and this is group 3, here is the car of explosives, here is group 2, and this will be group 1.

11,867 Now, the train is ready to depart to its destination. These trains are blocked 4, 3, 2 and 1, depending on the destination of the cars.

Q. I believe you, in describing this to me previously said it was something like sorting mail; is that correct?

A. It is like a mail carrier on a rural route, sorting his mail for delivery before he starts out on his route.

Q. Now, I believe you referred to a hump yard, Mr. Birk. Do you have a pamphlet, Mr. Birk, which contains pictures of a hump yard?

A. We do. We have a pamphlet covering one of our subsidiaries, the P & LE yard. However, we have three more yards similar to that. We could have used any one of them, because the basic principle of them is almost identical.

DEPUTY CLERK: No. 15 defendant C & O exhibit 25 for identification.

(No. 15 Defendant C & O Exhibit 25 being description of C & O Youngstown Ohio way yard at Pittsburgh and Lake Erie RR, is marked for identification.)

BY MR. WHEELER:

Q. Mr. Birk, I hand you what has been marked C & O Exhibit 25 for identification and ask you to state what that purports to be.

11,868 A. This is a description of our gateway yard, Youngstown, Ohio, located on the Pittsburgh & Lake Erie Railroad, which the New York Central operates.

On the front part you will note there is a picture of the yard. This area in here is the hump area where the cars are dropped.

Q. Before we go to that, let me offer this --

THE COURT: I was going to ask you, do you have an extra copy?

MR. WHEELER: Yes, your Honor.

I would like to offer this in evidence.

THE COURT: Any objection?

MR. WRIGHT: No objection.

THE COURT: It is received.

(C & O Exhibit No. 25 is received in evidence.)

BY MR. WHEELER:

Q. Mr. Birk, by reference to C & O Exhibit 25, will you explain what a hump yard is and how a carload of explosives passes into and through a hump yard?

THE COURT: Excuse me. Before he starts on that, suppose we take our morning recess.

(A fifteen minute recess is taken.)

(The jury is still out.)

11,869 MR. McGLOTHLIN: Before the jury comes in, I want to note a position. This is a discussion of Mr. Wright and Mr. Wheeler as to the necessary intent you must attach to rate reduction. As I understand, the argument is in effect all he has to do is show pre-existing conspiracy and this act was in furtherance of the conspiracy.

I sharply disagree with that. I wish to note that. I think they do not throw out the window the action of Congress in 5-A. They say that under certain circumstances the Congressional Act was treated in a particular way.

But it seems they set up quite stringent requirements and say as to the rate reduction itself, there must be shown a purpose to eliminate and not to meet. That condition does not satisfy by simple proof that in years previous two or twenty people combined for a result. I do not want to argue. I just want to note that.

THE COURT: I think we have plenty of time to come to that.

MR. McGLOTHLIN: I didn't want to be put in the position of accepting by silence, your Honor.

THE COURT: All right.

MR. SHEA: Your Honor, I have thought about that as well. There are dangers in summarizing this business to the jury. They are left with the impression that all Mr. Wright has to do is to show what the rate cut was likely to do in raising something of this sort. Now, he has a much heavier burden than that, as you know. I feel very strongly about this, No. 1, there is no showing here -- as far as my clients are concerned -- of any participation in any conspiracy: No. 2, I think it is clear as a bell that this rate cut was submitted to them only after the traffic -- it was not only to meet competition of trucks, but when they found that everything was going to be diverted to other ports, in effect they put it in.

11,870 But I realize the problem that there is in making any summary to the jury. I must express concern about it.

THE COURT: All right, let us proceed.

(The jury resumed their places in the courtroom and the trial proceeded as follows:)

THE COURT: Mr. Birk, are you comfortable there?

THE WITNESS: Yes, sir.

BY MR. WHEELER:

Q. Mr. Birk, before turning to exhibit, C & O 25, do you want to draw a hump on the blackboard here so that we can all follow you a little closer in your description as it relates to 25.

A. In switching in a hump yard the end purpose is the same. In other words, group cars. However, the operation on hump is a little bit different than it is in flat yards.

11,871 We have a raised place here over which the cars are dropped, and then they go down into the various group tracks into the yards.

The yard engine gets behind this series of cars and has a continuous movement of cars up to the crest of the hump. Up at this location here, which is called the crest, we have what is called the cut-off man. He has a list before him for each car and each car is to be dropped into a classification track.

I will explain a little bit later on the operations of going down into the various groups. Once this car reaches up there and is cut off, it drops down this grade here of its own momentum and rolls down, and then we have retarders here which I will explain a few minutes later, which controls the speed of the car, the distance it rolls into these various classification tracks.

The difference between a hump yard and this flat yard is merely the fact that you have this elevation here over which the cars are pushed to give them momentum to start down into classification tracks.

Here the engine has to keep moving back and forth to get them into these various tracks. In this case there is a continuous movement of the cars over the hump.

Q. Now, will you continue your description by reference to C & O Exhibit 25, Mr. Birk?

11,872 A. On the second page it notes an aerial view of the Youngstown yard.

Q. Incidentally, what was the cost of this yard?

A. Seven and a half million dollars.

Q. Will you proceed?

A. You notice the building right in that location which is known as the crest of the hump.

Q. That is in the lower center of the picture?

A. That is right, along beside the river.

Now, when a train comes into a yard of this type, they are pulled into what is known as a receiving yard, which is indicated on this side of the diagram.

Q. That is on the next page?

A. Yes. Now, after the road locomotive is cut off and taken to the engine house and the caboose is taken off and put into caboose tracks, the yard engine will get behind these cars and push them up to the crest of the hump which I demonstrated there. Then the cutoff man cuts the cars off and they roll down into what is known as retarders.

Now, we have what is known as a master retarder that controls the speed for it going into the group tracks. These are divided into various groups here. Each one of those groups has a retarder device which controls the speed.

11,873 Now, in these electronic yards this is done by advanced electronics. We have radar equipment for measuring the speed of the car rolling down the hump, the rollability of the car. We have devices for measuring the weight of the car. We have a device for telling you how far the car can go into the track. That is all done through electronics.

All the man does up in here is to -- at the crest of the hump --

watch the operation to be sure the cars are going into the proper tracks. Also, he is in there for safety measures in case something happens that he can control it manually by push buttons in his location there.

Now, these cars are dropped down into the various tracks according to classification, the same as I showed you on the flat yard. Now, we come to a car of explosives. We are not allowed to hump a car of explosives, nor are we allowed to flat switch a car of explosives. A car of explosives must be pushed to rest and cut off. On top of that we must have what is known as an idler car between the handling locomotive and a car of explosives. That is for safety measures and it is outlined in regulations.

Now, if we push the cars over this hump until we come to the car of explosives, then we have to do something with that because we cannot drop it down over the hump. So, then it is necessary for them to hold the cut back, and into one of these outside tracks here where we cut this explosives car off. Then he returns back and resumes his normal operation in there for pushing cars over the hump.

11,874 Now, that car eventually is going to have to be cut into a block similar to what I showed you in the flat switching yard. So, at this end of the yard we have what is known as trimmer engines or roustabout engines.

Q. You are referring to the right hand side of the diagram now?

A. Right. Now, this roustabout engine, or trimmer engine, when the groups are made up, will come up into this track with a car, pick up this car and bring it back down into the group in which it is supposed to be outbound for movement. He will cut that car into the center of the group.

Q. You are referring, when you say "that car", you are referring to the car of explosives.

A. The car of explosives, that is right.

Now, after these groups are made up, then they are pulled by this roustabout engine over into what is shown here as the departure yard where the train is made up for outbound movement to its destination.

Q. That is on the right-hand side of the diagram?

A. That is on the right-hand side, yes.

Q. Now, do you want to turn through the rest of the pages of this exhibit and just briefly indicate what is of interest there in connection with your study?

11,875 A. I beg your pardon; I did not hear you.

Q. Will you read it, please?

(The reporter read the question.)

A. These are known -- this diagram on the next page, shows how the cars are dropped down into the various group tracks. That is just merely one group section.

Now, if you turn over to the next page, you will see in the upper lefthand corner a truck-side which shows the journal box which we previously described. It is immediately under that arrangement there which is the --

Q. That is the picture in the upper lefthand corner?

A. Yes. The next picture on the right on that same page is the crest of the hump with the cars starting down into the master retarder.

Down below in the center is the group retarder which controls the speed of the car going into its individual group.

Q. Now, is that the crest of the hump in the background there?

A. That is the crest of the hump in the background, yes.

Also on the righthand side we spoke of couples a while ago being fastened to the under-framing of a car.

11,876 A little circle shows two couplers fastened together between two cars. The lever that you see extending to the lefthand portion is known as a cut-off lever. I referred a while ago to the cut-off man. That is the lever he operates to separate the cars before they roll down the hump.

Q. Before you turn then from that page, on the right-hand side of the left-hand page there are a list of items. Would you explain what those are, starting with the weight of the car?

A. These humps are operated with electronic brain, you might say. All this data fits into an electronic machine, and the weight of the car, weather conditions, rollability of the car -- that means, its tendency to roll; some cars roll fast and some cars roll slowly down there. That is all computed and goes into the machine with electronic devices. The tractor -- whether it is going into a curved track or into a straight-drop into a track.

We try to maintain a coupling speed of not to exceed four miles an hour. Therefore, this device is set up to have a coupling speed of roughly three and a half miles an hour.

Wind resistance is measured, and the length of the track is measured -- how many cars are in the track electronically. That is all fed into
11,877 the machine and you can tell the distance a car has to travel before it couples into the car that has already been dropped down into that location.

Now, on a car of explosives, however, we cannot do that. We cannot hump those cars. We have to handle them by an individual engine and cut them into their proper group. If you notice on the next page, turn to the

next page or the second page, at the top you will notice that what we call the hump yard office is located right on the crest of the hump. On the righthand portion of that same picture you see one of the steel jaw-clamping devides which we call a retarder, which clamps the sides of these wheels and controls the speed of them.

Q. It controls the speed of the car, yes.

In the lower picture you see a picture of a yard master in there routing the cars. He can have as high as five different classifications in that machine at one time.

The other pages in here cover merely the buildings. In the center of the next page is the man on the hump retarder tower who oversees and looks down through the tracks to be sure that everything is all right, and in the event that something happens down in one of these classification groups, he can immediately stop them and route them on another place. He has control and can take it away from the electronic brain any time he desires.

11,878 Q. Now, Mr. Birk, after a car of explosives has been classified and blocked, as you have described, what takes place in so far as road haul to destination is concerned?

A. After the car has been classified and blocked into the outbound train movement as I described on the flatyard switching operation up there, also there must be a thorough examination made of the waybills to be sure that they are properly identified, proper routings are on, and that each waybill carrying explosives is stamped with Explosives Stamps in letters three-eighths of an inch high at least. That is done and must be done so as to direct the attention of the train crews and handling crews that they have a car of ammunition or explosives on that train.

Q. Now, you have got the train at the far end of the yard for departure, and the road haul engine picks it up there and starts it toward destination. Will you please explain the trip from there on, Mr. Birk?

A. After these cars were blocked for their different destinations, the road haul train is on its way.

Now, in many cases we have blocks of cars that are blocked at one point and can pass through at least two, three or more terminals before it has to be reclassified again for final destination.

11,879 Those cars must be handled as nearly the center of the train as possible. There must be sixteen cars behind the locomotive or sixteen cars ahead of the caboose.

Q. Now, Mr. Birk, when the car arrives at an intermediate yard where it has to be reclassified, what takes place?

A. The same procedure is followed as I explained here in the initial setup. In other words, they must handle the car exactly the same as they did on origination of the car. However, if it is in a block going through, the car is not touched. We consider those through trains and through cars.

Q. Now, suppose the carload of explosives is being shipped to a point that is on the line of another railroad. What happenen when you come to the point of interchange with the other railroad?

A. Well, we come to a point of interchange with another railroad, it goes into that particular yard and it must be grouped and blocked into the interchange cut, similar to what you do in blocking cars for oblong movement in a road train.

The same procedure follows in protecting a car, cutting it into the 11,880 group, as you do in a road-haul movement.

Q. What inspections have to be made of the car at that point?

A. When a car is offered for interchange, the car must be thoroughly inspected by the receiving road before it can be moved, to be sure that the placards are on the car, the car is properly sealed and has not been in any accident, the car is not leaking, and it complies with all of the ICC regulations with respect to safety appliances and so forth.

Q. Where is this car placed at this interchange yard with respect to the other cars in the yard?

A. It is to be placed out by itself.

Q. Now, were the procedures that you have outlined followed by the railroads in the official territory in 1956?

A. They are.

Q. Now, does the handling of an explosives car, because of these precautions which you have outlined, take more time than the handling of an ordinary -- a car of ordinary commodities.

A. Yes, sir.

Q. Have you prepared an exhibit to show that?

A. Yes, I have.

11,881 DEPUTY CLERK: No. 15 Defendant, the Chesapeake & Ohio Exhibit 26 for identification.

(A document showing time required to handle explosives in Official Territory in 1956 is marked for identification Defendant 15, C & O Exhibit No. 26)

BY MR. WHEELER:

Q. I hand you what has been marked for identification C & O Exhibit 26 and ask you to state whether or not that is the exhibit to which you refer?

A. It is.

Q. And it in general shows the time required to handle explosives in Official Territory in 1956?

A. Yes, sir.

Q. And your name is shown on the exhibit?

A. Yes.

THE COURT: Mr. Wheeler, does the jury need the exhibits they have?

MR. WHEELER: They may for a while, sir.

THE COURT: All right.

MR. WHEELER: Your Honor, I offer C & O Exhibit 26.

THE COURT: Any objection?

MR. WRIGHT: None.

THE COURT: Received.

(C & O Exhibit 26 is received in evidence.)

11,882 BY MR. WHEELER:

Q. Now, this exhibit is true and correct, to the best of your knowledge and belief, Mr. Birk?

A. It is.

Q. And it was prepared by you?

A. Yes.

Q. Did you check this exhibit with the Operating Officials of any other railroads in Eastern Territory to verify the time schedules that are given in here?

A. I did.

Q. With what railroads?

A. The C & O, the Erie Railroad, the Pennsylvania Railroad, the B & O.

Q. Did you recently witness the actual handling of explosives by any other railroad than those that you have mentioned?

A. Yes, I did.

Q. What railroad was that?

A. Milwaukee, at Crane, Indiana.

Q. That is in Official Territory?

A. It is.

Q. Did you check the records of the other railroads in connection with their handling of explosives?

A. I did.

Q. What railroads did you check?

11,883 A. The Pennsylvania, the C& O, the Erie, the Baltimore & Ohio.

Q. On the basis of your experience and your investigations, do you believe that the items shown on C & O exhibit 26 are representative of the handling of explosives in Official Territory in the year 1956?

A. I think they are.

Q. Explain how cars are selected for use in loading different commodities.

A. When trains come into the yard, a receiving yard which I showed on this sketch here awhile ago, the inspectors go along -- usually we have two inspectors, one on either side, and they go along and inspect these cars and maybe for defects, repair a track, or commodity, inspect

them for different classifications of commodities required for loading. These cars are then switched to the cleanup track, the repair track, or sent on to destination.

In some cases, we have cars come into the yard that are on car service orders and they go right straight through to the places which have been identified.

Q. Do you place a notice on the car noting its servicability for loading different commodities?

A. Yes, they have -- there are several methods used on that. In my particular railroad, we use a commodity inspection card.

11,884 Q. Does it require any additional time in selecting a car for explosives than selecting a car for any other commodity?

A. Not in Official Inspection, no.

Q. And in Item 1 of your exhibit 26 you show Additional Time Required in the Preparation of Pre-loading and Pre-movement Inspection of a car used in handling Explosives. Would you please explain how you arrived at that figure?

A. Yes. We have made numerous studies on the cleaning and classifying of cars. Last December we had an order out in Illinois for six cars for explosives loading. I had our inspection forces and our car foreman at that location make a detailed study of the examination, preparation of this car for explosives loading. Also at the same time I had him prepare a statement showing the detailed operation for the cleaning of Class A cars for other commodities. This is a comparison between the two in which we show an excess of 21.25 minutes for an explosives car, over that of a Class A car used for other commodities.

Q. So that the 60.415-41.7 minutes represents the time it took to prepare a load and inspect an explosives car, is that correct?

A. That is right.

11,885 Q. And the 39.167 was the time it took to prepare and inspect other box cars?

A. Right.

Q. The difference there is 21.25, as the additional time that is required and that you took in inspecting an explosives car?

A. That is right.

Q. In your opinion, are the results of the time study which you made representative of the average time required for those operations in Official Territory in 1956?

A. They are.

Q. Prior to the computation of this time, had you made an estimate, yourself, as to the amount of excess time that would be required for preparation of free-loading inspections of an explosives car?

A. Yes. We are continually looking into the operation of cleaning and upgrading of cars.

We try to produce economies and improve our method for preparing those. We have estimated between fifteen and twenty minutes excess time on a car of explosives over other Class A cars.

Q Would you please continue your explanation of Exhibit 26?

11,886 A. As mentioned previously, before a car could be moved from an arsenal, it must be okayed for pre-movement. In that particular case the car inspector is notified, our people are notified to send a car inspector in for a pre-movement inspection.

On various places on the road that time will vary depending on the amount of travel time that is involved or required. In some cases you have inspectors located immediately at the plants. In other cases they have to be

sent quite some distance to make this pre-movement inspection. We have figured that from our study we have made that pre-movement of inspection time, including inspection and travel time will run about 180 minutes.

Q. Where did you get the 201.25 minutes that you show as the next item on your exhibit?

A. That is the addition of the pre-movement inspection time, including -- plus the additional inspection time for cleaning the car over normal commodity cars.

Q. Now, will you explain item 1-B of your exhibit 26?

A. Yes, as I mentioned previously, sometimes we have cars that are rejected by the Government employees at the arsenals. And from studies we have made around on the various territories we have found that the average is about one in five. The fact of the matter, it will vary from one to 20 per cent. So what we have done, in taking one out of five, we have divided
11,887 the 21 and 25 by four, because that time would be spent and gone.

So, we charge it out against that, and it would be merely a mathematical calculation dividing the 21-25 by four.

Q. In other words, you spread that time over the four remaining grouped cars?

A. Right.

Q. Now, the next item I thought there is "Auto Hire." What does that cover?

A. As I mentioned, in some cases we have to send inspectors out from distant points from arsenals, to make pre-movement inspections. They travel by automobile, in most cases. Even in some territories where we have inspectors located immediately at the plants, they had to travel anywhere from five to fifteen miles inside the plants making these inspections and returning the certificate back to the building.

So, we have taken an average here on the studies we have made of about 50 miles, then we have charged out that 50 miles against the pre-movement inspection.

Q. What is the average cost per mile of the eight cents? Where did you get that figure?

A. That is a rate that is paid to employees for the use of their own automobiles in driving out on company business.

11,888 The rates vary from seven to eight cents. I have not found any place where anybody pays more than eight cents.

Q. If they use a company-owned car, that figure would be less?

A. Yes; considerable studies have been made. We made a lot or them in our own territory and try to draw a line of demarcation as to when to lease a car, when to own a car and when to pay mileage on there.

It has been found that where you have enough mileage, it would be cheaper to own the car than to pay this mileage.

Q. Now, item 2 is labeled "Car Detention Time in Originating A Carload of Explosives."

Will you please explain that item, Mr. Burk?

A. Well, you mentioned --

Q. In the first place, what do you mean by "car detention"?

A. As I mentioned a moment ago, we prepare these cars at possibly some distant point and move the cars into the arsenal for loading. Then when they get there, a car is taken by a government engine, moved inside the plant. Say, it goes down around Monday, is taken to the plant on Tuesday and loaded Tuesday or Wednesday, brought back out and taken out there on Thursday, and then we count that as car detention time.

11,889 Q. Now, is that the number of car days for switching? What does that item 2-A cover?

A. The car days for switching. Before I start on that, I would like to say that we made a study of the Interstate Commerce Commission both in 1958, in which we found that the time for the average car for switching on average commodity was 1.8 days. For the switching of the empty-in and load back out, 1.57 for the unloading. In order to dispel any thought that there might be more time on an explosives car, we doubled that figure and showed 3.6. As I mentioned before, sometimes we move these cars into some distant point and move them into where they are going to be loaded.

Q. Wouldn't you have to do that for any car in any event?

A. That is right.

We do that now for grain elevators, coal mines, or any industry along the line.

Q. Well, suppose, sir, you start this way freight out of Chicago, for instance, or out of your Chicago yard. There will be cars blocked for delivery to various industries on this line out in Chicago.

A. The way the statement is made up, usually on station order, 11,890 including empties to be placed for loading, or to individual industries or stations along the line -- this case is no different, because the car would be --

Q. When you say "this case is no different", you are speaking of cars of explosives, I take it.

A. Yes, cars of explosives, to be delivered to the arsenal.

Q. Now, the next adjustment in item 2 is for car detention time in loading explosives. Would you please explain that?

A. Yes, sir.

Sometimes in some locations the cars are moved in by the company and placed on the interchange track for the arsenals to pick them up. Now, in some cases, we have what we call alternate days local runs. Maybe all it was was to load a car on Wednesday, and well, when this load goes on Tuesday, this car will be set in there on Tuesday for him. However, the detention time there is not counted until a car is actually spotted at the loading point of where it is to be loaded. Now, we have checked into this and found that the time is about five days.

It varies from one to five days in the various territories. Some days they load them and some days it takes more than one day.

11,891 Q. Now the next item -- then you totaled those two items to get the 8.6 days shown here.

A. Yes.

Q. Then you deducted the normal detention time?

A. The normal detention time is 3.55 on normal traffic.

Q. And that you deducted from the 8.6 days for explosives traffic?

A. That is right, in excess of 5.005 days for explosives time.

Q. Now, will you explain where you got item 2-B?

A. A moment ago I mentioned --

Q. On the next page?

A. Excuse me.

Q. I say that is on the next page.

A. A moment ago, I mentioned that occasionally we have cars rejected by the government employees. We have taken 3.6 days which we had before for switching the car, and it will take them approximately a

day or two to project this car in the plant. We have added that on for a total amount of 4.6. The 1.55 is merely again a mathematical calculation in which we divided the 4.6 days and get 1.15 making a total excess car detention time at origin of 6.2.

Q. That is in addition to the 5.005 days on the previous days, plus the 1.5 which you have explained?

11,892 A. That is right.

Q. The next item you have is Item 3: Switching Time. Please explain that for us.

A. One of my jobs for a number of years has been to control in switch operation, train operation, in my yards. I receive on my desk each morning a report of the total trains handled, the switch engine used the day before, the cars handled and the time it takes to handle each one of these cars in each one of my yards, in my territory. We have made studies from time to time covering the detailed operation in each of the yards.

I might add that back in 1934 I was assigned to this particular job for a little over a year in figuring out the detail minutes on each job comprising a complete yard job.

Q. Now, have you made comparable or similar studies in the yards of other railroads in official territory?

A. Yes, at the present time in my particular territory, we are constructing a new electronic yard and we spent considerable time in yards all over the country, in all directions, studying their operations and trying to pick out the better means they had in their yard and incorporate them into our new yard.

11,893 Q. Now, referring to item 3-A and under "Average Traffic", you show there, "per flat yard, five minutes." What does that mean?

A. The average time of five minutes is the time it takes to classify and block the car force on movement in a flat yard.

Q. What is the item under "hump yard?"

A. Under "hump yard" we can do it, as I explained awhile ago, the car will move over more rapidly. We figure that it takes three minutes to do a hump yard.

Q. That relates to average traffic.

What is the situation with respect to explosives traffic?

A. As I outlined awhile ago, in the switching yard, the movements have to be made by the yard engine in spotting the car into a safe location, picking it up, cutting it back into the road again. It takes 20 minutes.

Q. How about a hump yard?

A. And a hump yard, as I explained over there, the operation is more curtailed when you are handling a car of explosives, and it takes about 10 to 15 minutes to set this car off in a track by itself, and then it takes roughly 25 or 30 minutes to pick this car up and cut it into its block and get it into a long train, making a total of 25 minutes in a hump yard.

11,894 Q. What is this item of "through cars," Mr. Birk?

A. Then, as I mentioned previously, we try to block cars for a through movement to keep from re-switching them at intermediate terminals as we transverse our railroad. And in many cases all we do is change the caboose and crews and the car is gone through what we call a terminal destination for some other terminal or break-up point some distance away.

We allow on most of our time freights an average of 15 or 20 minutes for performing that function, and here we are obligated a half-minute per car.

Q. How many cars would you ordinarily have on an average?

A. Most trains will vary from 85 cars up to 140 or 150 cars.

Q. So that your allowance here has been on the --

A. The generous side.

Q. What is the item, "Non-productive engine time," Mr. Burke.

A. The non-productive engine time is time spent by the crews in which the engine is standing still, for servicing the locomotive, fueling, or lunch periods by the crew, et cetera.

Q. Now, I want to back up for a minute: Did the times that you have given under your flat yard and hump yard switch include the use of an idler car between the engine and the explosives car?

11,895 A. It does.

Q. Now, based on your experience, would you say that the switching times that are shown in your exhibit are representative of those that were applicable in official territory in 1956?

A. Yes.

Q. Is there any substantial difference in switching of explosives today as compared to 1956?

A. Basically, no.

Q. Aren't there more hump yards in Official Territory today than there were then?

A. There are more hump yards in Official Territory today than there were in 1956.

Q. And what is the result of that?

A. Well, they are humping more cars, of course, in the humpe service than they are in flat, and it takes longer to handle a car of explosives in a hump yard than it does in a flat yard.

Q. So that your time would have been less in '56 than it is now; is that correct?

A. That's right.

Q. Now, the next thing you refer to is engine time required to originate a carload of explosives: Would you please explain that, Mr. Birk?

11,896 A. That would -- the engine time required to originate a car of explosives is the same as explained above, and it depends on whether it was a flat yard or a hump yard.

Q. What is that item "Industrial Service?"

A. As I mentioned a moment ago, on the diagram on the board we have some places where locomotive, road locomotive or railroad locomotive moves inside the gate at the arsenal to pick up these cars, and in those cases we have to stop and wait for the guards to come down and open the gates and take away cigarettes or combustible materials that they might have on their person before they let them go in. We figure it takes 10 minutes time in there for them to get the gates open and get the locomotive inside the gate.

Q. Now, Mr. Birk, in your earlier diagram of picking the car up from the arsenal, placing it in a road haul train, you pointed out the time that that took. Is any greater amount of time required for that transfer service in the case of explosives than in the case of other commodities?

A. No. As I say, the time is practically the same. It's a straight pick-up movement.

Q. Why not, Mr. Birk?

A. Well, the car, regardless of whether it is a car of explosives or

11,897 a car of grain you are going to pick up, the only difference is that

the crew has to hold onto enough cars to properly bury the car of explosives in its train; otherwise a car of grain can be picked up on the head end. But the time element is very, very small.

Q. The next item is the engine time required to switch explosives cars at an interchange point. Would you please explain that?

A. Yes. At an interchange point, when a car gets into the yard, we block this car, similar to what I explained awhile ago. It has to be handled in the same manner. The actual time in delivering to the interchange point is no different than a commercial car.

Q. Now, the next item is the engine time required in switching a carload of explosives at an interchange point between one railroad and another.

Would you please explain that?

A. Well, it has to be classified in block, into the interchange group, similar to what you do in originating a car in the yard. And then it is delivered in the time element in going from the yard to the interchange point, and it's no different than a commercial load.

Q. The next item there is Item 3-F, percentage of cars switched in flat yard versus hump yard, and percentage of through cars in Official Territory in 1956.

11,898 Q. Where did you get those percentages, Mr. Birk?

A. Well, the New York Central, I made a study of the cars handled through our various types of yards on the system, and I found that 72 per cent of our cars are flat switched, 28 per cent are humped, and 11 per cent are through cars.

In observation of other yards, and in conferring with other railroads, the figures indicated below here are representative of what they do in the other territories.

All railroads are interested in handling as many through cars as they possibly can, to cut down their yard costs.

Q. Now, would these figures be applicable in 1956 as they are today?

A. Yes, with the exception that possibly there is a few more cars being humped today than there were back in '56 due to the introduction of the new electronic yard.

Q. Are explosives cars inspected when a train stops at intermediate yards for intra-train, that is, switching within the train, or switching between the train that comes in and a new train that is going out?

A. We make a normal inspection of cars in that train, and all cars are inspected alike in that particular respect. Stopping along the railroad at a way point, for example, the crews are instructed according to the operating rules, to walk over their train and look over the condition of the train and see that there is no hot boxes or anything dragging, that would cause a derailment or any other defect that might be in evidence.

11,899 Q. Do you believe that the times that are shown there for this inspection time are representative of those that prevailed in 1956?

A. I do.

Q. Now, will you describe your Item 4-C, which shows the percentage of cars interchanged at major terminals versus intermediate points?

A. Yes. We made a study and we have been making studies for quite some time, like all railroads. At our interchange points we have outlying points on our railroads, and our figures on New York Central indicate that about 75 per cent, or more, of these cars are interchanged at major terminals and 25 per cent at outlying points.

Q. What would you consider a major terminal, for instance, Mr. Birk?

A. That's a yard where you bring the cars in for blocking or grouping for destination.

Q. I notice you have Item -- and how would you distinguish that from an intermediate point?

A. Well, we have a lot of places, and all railroads do, where lines intersect and cross, and we have had at those crossings in a number of places connection tracts where cars are delivered from the various roads, the connecting roads, and those are called outlying interchange points.

11,900 Q. I notice you have here "Auto Hire" shown here as 50 miles and 8 cents, and I believe you previously covered that, did you not?

A. Well, that's to take care of these points we are just speaking about, where they are distances away from your terminal, where you have your crews and your yard forces located, and we send an inspector out to make a thorough examination and inspection of those cars before they are accepted at interchange, and he travels by auto, also, and we figure it averaged about 50 miles.

Q. Mr. Birk, the next item you have is Item 5, "Switching Time at destination." The first item is Item "A" - Classification of blocking.

Will you please explain that?

A. At the destination, when a train arrives in the yard, the cars are blocked and grouped according to the various industries in which they are to be delivered, and the time there would be the same as we have shown for the handling of an explosive car in the yard.

Q. Now, the next item you show there is 5-B, labeled "Industrial Service," and you have a figure of 10 minutes.

11,901 Would you please tell us where you got that figure?

A. I explained a while ago that in some cases when we have to go inside the arsenal to deliver the cars in there, we have to get permission and have the guards come down, open the gates, let the crews in to look at the cars inside the fence, and that takes roughly 10 minutes to get them down there and get the gates opened to get in.

Q. This is similar to the process where you pick up the car in the arsenal originally?

A. Right.

Q. Now you are making the delivery to the arsenal.

A. Right.

Q. And this is the time that would be required to get inside the gates of the arsenal.

A. Right.

Q. The next item is Item 6, "Car's detention time at destination."

Please explain the first item there, which is "switching."

A. It doesn't take any longer to switch an explosives car than it does a normal car, and, as I explained awhile ago, in the Interstate Commerce Commission Report 258, on cost-cutting in there, they used an average of 1.8 days in there.

11,902 Now, the unloading time, sometimes it will vary from one, two to five days. On export travel they are allowed five days free time. Other places they might unload.

Under the demurrage tariff they are allowed three days to unload the car.

Export travel, five days.

Q. You mentioned demurrage, Mr. Birk. What is demurrage?

A. Demurrage is a charge placed against a shipper or receiver for undue delay to a car. In other words, he gets a car in and he takes his own time about getting it unloaded, and if he has it in there longer than his two or three days, then he is assessed a charge, a tariff charge for holding that car, and it varies depending on the number of days he has the car in there.

Q. That is an amount paid to the railroad to pay for the cost of keeping that car in there an undue time; is that correct?

A. That's right.

Q. And the demurrage schedules are filed with the Interstate Commerce Commission, are they?

A. Yes, they are covered by the detention tariff.

Q. Does the handling of explosives increase the maintenance cost on the cars that are used for transporting explosives?

11,903 A. No. The fact of the matter, as carefully as we have to handle explosives in there, I think there is less damage occurs to a car handling explosives than there is to a normal car.

Q. Are there any other costs that you have not mentioned that are involved in handling explosives?

A. Not to my knowledge.

Q. Now, on your car detention time, then, you have 1.8 days for switching and five days for unloading; a total of 3.8 days, or 6.8 days.

A. 6.8 days, right.

Q. And from that you have taken the normal car time for the unloading operation; is that correct?

A. Right.

Q. And your excess time is 3.25 days?

A. That's right.

Q. Do you believe that is representative in time in the Official Territory in 1956?

A. I do.

Q. Does this exhibit apply to both Class A and Class B explosives?

A. No. Class A explosives were only included in this exhibit. There is a difference in the handling of Class and and Class B explosives. Class B explosives can be humped. Class A explosives cannot.

11,904 Q. Is that a regulation of the Interstate Commerce Commission?

A. That's right.

Q. Now, the next item on your exhibit, Item 7, is labeled "Transit Shipments, 15 per cent."

Would you please tell us what a transit shipment is, Mr. Birk?

A. Yes. The Government was granted what is known as transit privileges in handling explosives.

Supposing we had a car going from Washington to New York and the rate was $1.00 per hundred on that car, and the Government decided to ship this car to Philadelphia and then to New York, and the rate between Washington and Philadelphia would be 60 cents, and the rate from Philadelphia to New York would be 60 cents, which would make a total of $1.20. But under the transit privileges they could ship this car to Philadelphia, then to New York; at the rate of $1.00.

Q. Now, is the 15 per cent your judgment as to the percent of shipments that moved under transit privilege in 1956 in Official Territory?

A. Yes, sir.

Q. Mr. Birk, do you know where the traffic movements generally in Official Territories are balanced or unbalanced?

11,905 A. In Official Territory the loaded traffic is heavy in the eastbound direction.

Q. That is, from the West to the East?

A. Right.

Q. Moving into Official Territory from the West?

A. That's right.

Q. What is the situation with respect to explosives traffic?

A. From the samples we have seen, the majority of the traffic is moved westbound.

Q. That is to say, it moves from Official Territory to Western Territory?

A. That's right.

Q. Is this advantageous or disadvantageous in the operation of the railroads?

A. As far as handling explosives is concerned, it is advantageous because we get a load in a car which would normally move empty, back to the West, for loading in the West.

Q. In other words, it tends to balance out your movement of empty cars?

A. That's right.

Q. Now, Mr. Birk, you have outlined in considerable detail the additional time required in the handling of explosives in your Exhibit 26.

11,906 Suppose you handled two cars of explosives at one time. Would each car require the same amount of additional time as shown in your Exhibit 26?

A. The inspection time would not be changed, but the travel times in here, in getting to the point where you inspect the car, the man could go over there and that would be regarded between one and any multiple number of cars that you inspected. So it would have a tendency to reduce it.

Q. How about switching? Would it have any effect on switching time?

A. Switching time you can handle five cars and set them out in location in a very small amount of additional time than what you would one car.

Q. Do you know the portion of explosives cars in Official Territory in 1956 that moved in multiple carlots as against single car-lots.

A. From the checks that I made, they varied between 45 and 50 per cent of multiple movement.

Q. That is to say that in 45 to 50 per cent of the cases, two or more cars moved at a time?

A. That's right.

Q. Did you take the time savings resulting from the movement of explosives in lots of more than one car into account in your study?

11,907 A. No. These figures are based on single car movements.

Q. Do you have anything to add to the testimony you have given to take, Mr. Birk?

A. No, nothing.

MR. WHEELER: That concludes the direct examination of Mr. Birk.

Mr. Wright?

MR. WRIGHT: We have no cross examination, Your Honor.

* * *

11,911 (The statement submitted by Mr. Flynn follows:)

The purpose of the testimony of Mr. Wright which is about to be offered, is to establish that the reduced rate level in effect throughout Docket 28300 Territory after April 1, 1956 was compensatory.

The Western roads rely upon the cost evidence to be introduced by Mr. Wright because, as will be shown by the testimony, Mr. Wright has made those upward adjustments in the costs of handling rail traffic which reflect the various respects in which explosives traffic occasion additional costs. As adjusted in this manner, the cost data to be supplied provides a conservative measure of the actual costs, in our view. By this, I mean that the costs of handling this traffic are no higher than the costs shown by Mr. Wright. If called to testify, witnesses on behalf of a number of the Western roads would establish that there are additional cost factors or adjustments which could be made in these costs which would operate to reduce the costs, and thus show that the actual costs of handling explosives traffic are below the level shown in Mr. Wright's exhibits. However, since our purpose is to prove that these rates are compensatory, it seems clear that, if the rates
11912
in question return amounts in excess of the costs shown by Mr. Wright, they would even be more above lower costs. For that reason we see no reason to burden the record with further witnesses on this subject.

* * *

DIRECT EXAMINATION OF MR. MAHONEY BY MR. WHEELER

11,917 BY MR. WHEELER:

Mr. Mahoney, will you please state your name, your address, and your present occupation?

A. My name is J. J. Mahoney. My address is 7407 South Louella Avenue, Chicago 49, Illinois. I am presently self-employed as a transportation consultant.

Q. Would you please describe your background and experience in the transportation field?

A. I was first employed by the Denver & Rio Grande Railroad in November, 1907. I remained in the services of that railroad until -- I have got to look at some dates here -- May 12, 1912, when I was employed by the Santa Fe Railroad as a switchman.

11,918 I served at Pueblo, Colorado, from 1912 to 1920 as a switchman, and engine foreman, and Assistant Yardmaster, and a Yardmaster.

In 1920 I was promoted to a General Switching Inspector of the Western Lines of the Santa Fe Railroad, and in November of the same year I was promoted to General Transportation Inspector of the Western Lines.

In 1924 I was promoted to Trainmaster of the Rio Grande Division and in 1926 I was appointed as an Assistant to the General Superintendent of Transportation with headquarters in Chicago, for the entire Santa Fe System.

In June, 1936, I was promoted to the General Superintendent of Transportation for the entire Santa Fe System, with headquarters in Chicago, and I remained in that capacity until November 30, 1936, when I was retired in accordance with company rules.

Q. You meant 1956, did you not?

A. '56, pardon me; 1956.

Q. In what capacity have you served as a transportation consultant since your retirement from the Santa Fe?

A. I have done some special work in investigations for the Santa Fe Railroad, for the Houston Belt Terminal Switching Line, for the P.& L.E., Pittsburgh and West Virginia Railroad.

11,919 Q. You mean Pittsburgh & Lake Erie?

A. Pittsburgh & Lake Erie; Pittsburgh & West Virginia.

For the National Railways of Mexico; and also for the General San Martin and Amitri Railroads in Argentina, South America.

Q. Mr. Mahoney, would you please describe in general your duties as General Superintendent of Transportation for the Santa Fe Line?

A. The General Superintendent of Transportation for the Santa Fe has several duties:

One, they formulate and distribute all manifest freight train schedules. They provide what traffic will be moved in such trains and the manner in which such trains will be made up.

They also handle, with connecting line carriers, and arrange connections with such carriers, so that carload traffic will move through after being interchanged from the connecting line carriers to the Santa Fe, and vice versa, from the connecting line carriers to the Santa Fe; also distribute freight and passenger cars to the four grand Divisions of the Santa Fe Railroad, as well as interchange empties to connecting line carriers.

And in my capacity I had charge of all car-accounting matters, dealing with all railroads, in the settlement of car hire while in the capacity of General Superintendent of Transportation.

11,920 Q. Mr. Mahoney, are you familiar with the railroad operating territories that have been established by the Interstate Commerce Commission?

A. Yes, I am.

Q. In what territory does the Santa Fe System function?

A. According to the Territorial Districts established by the Commission, the Santa Fe operates in what we call or term the Western District.

Q. What does that District include?

A. That District comprises the territory west of the Mississippi River, including the State of Wisconsin, and about half the western half of the State of Illinois.

Q. Would you indicate that on the map beside you there, Mr. Mahoney?

* * *

THE WITNESS: Everything west of this Mississippi River here up to and including the State of Wisconsin, and about half the State of Illinois, the whole Western District.

BY MR. WHEELER:

11,921 Q. That is clear to the Pacific Ocean, is it?

A. Clear to the Pacific Ocean.

Q. While you are at the map, Mr. Mahoney, I wonder if you would point out in general the routes of the Santa Fe, beginning in the East and moving westward?

A. The Santa Fe extends -- Chicago is the eastern terminus of the Santa Fe Railroad. We operate to the Missouri River, Kansas City, and then our main freight line goes down through the southern part of Kansas, Oklahoma, New Mexico, Arizona, and into California.

Our Texas line goes the same route as far as Kansas City and then goes south as far as Houston and Galveston, Texas.

Then our Colorado traffic goes through Kansas City and on out to Pueblo, Colorado Springs, and Denver.

Q. Where do you operate in California?

A. We go into San Francisco, Los Angeles, and San Diego.

Q. Would you also, while you are there, point out the general routes of the Milwaukee Railroad?

A. The Milwaukee Railroad extends east to the southeastern part of Indiana, to a point they call Westport, through Terre Haute, Indiana. Then they go north through Milwaukee, up into Duluth, and then their route from Chicago, they have a route into the Twin Cities and out through the Dakotas, both Dakotas they serve, Montana, and into Washington.

11,922 Q. Are you generally familiar with the operation of other railroads in Western Territory?

A. Yes, I am. In arranging your interchanges with carriers you connect with in the West, you become familiar with their operations, and especially with their manifest trade.

Also, I served in an advisory capacity for the Office of Defense Transportation in the handling of tank cars and refrigerator cars during World War II.

I also served in an advisory capacity to Mr. W. F. Kirk, who was appointed by the Interstate Commerce Commission and approved by the Office of Defense Transportation to establish headquarters in Chicago during the war. That was I.C.C. Special Service Order No. 99.

It was Mr. Kirk's duties at that time to expedite all war material, and the railroads in the West made daily reports to Mr. Kirk's office, stating the volume of traffic that had moved east and west, and what was on hand to move, and at any time that any railroad appeared to be getting congested and

sluggish in the movement of war materials, Mr. Kirk had the authority to divert the war materials from that railroad that became sluggish, to railroads that could move the war materials expeditiously. And I served in the capacity of an adviser. Five of us were appointed to serve in an advisory capacity to Mr. Kirk.

11,923 Q. Have you had experience in the transportation of ammunition and explosives?

A. Yes, I have.

Q. Have you made a study of the handling of explosives and ammunition by the railroads in the Western District for use in this proceeding?

A. Yes, I have.

Q. Did anyone assist you in making this study?

A. Yes, Mr. John H. Stuart, retired General Manager of the Milwaukee Railroad, who has had 47 years experience in the operating departments of the railroads.

Q. You stated that he was with the Milwaukee road, did you?

A. Yes, sir.

Q. And the Santa Fe and the Milwaukee are the only two railroads that extend from Chicago all the way to the West Coast?

A. That's right.

Q. Would you please describe how your study which you referred to was made?

A. Mr. Stuart and I made time studies on the Milwaukee and Santa Fe Railroads with respect to the selection and conditioning and preparing cars for the loading of explosives.

11,924 We also made studies as to the switching time required to handle not only the empties to the loading points, but the loaded cars of explosives in our yards, our flat yards, our hump yards.

Q. Mr. Mahoney, is Mr. Stuart in the room?

A. Yes, Mr. Stuart is present.

Q. Is the handling of explosives by the Santa Fe and the Milwaukee in your opinion representative of the handling of explosives by other railroads in the Western District?

A. Yes. I think the territory over which the Milwaukee and the Santa Fe operate and the physical characteristics of that railroad, the flat territory, the mountainous territory, is typical and really representative of handling explosives in the Western District.

Q. What year did you use in making this study of the handling of explosives?

A. Our primary study was made for the year 1956. We made some studies in 1957 where the records had been destroyed in keeping with the Commission order. You don't have to keep records so long any more. But we could have selected any year, 1955, '56, or '57, and they are basically the same. But primarily, 1956.

11,925 Q. Mr. Mahoney, does the I.C.C. issue instructions to the railroads as to how they shall handle explosives and ammunition?

A. Yes, they issue very definite instructions.

Starting, I might say Mr. Birk outlined briefly what those instructions are, and I will briefly outline them myself:

The Interstate Commerce rules and regulations governing the handling of explosives is published in tariff form. Now, the item 74.525 is the instructions as to the selection of a car, the type of car to be selected. It also outlines in detail what the inspectors are to inspect of that car and how the car should be cleaned before the inspector making such inspections can certify that that car is suitable for explosives loading.

Now, 74.589, in the same tariff, outlines in detail how a carload of explosives will be handled; not only in yard switching, but in the train movements; how the car will be placed in trains.

Those tariffs control the movement of explosives traffic throughout the whole United States, and the tariff, as published in New York, is distributed to all carriers in New York, along with the pamphlets that are part of that tariff, for each class of employees.

11,926 They also publish the posters that we put in caboose cars at points where yard crews go on and off duty, and they are all published by the same Bureau of Explosives.

Q. The poster which you were referring to, is that the same as Exhibit 22 which Mr.Birka introduced in evidence, that is C & O Exhibit 22?

A. That's the same poster that we use in Western Territory.

Q. I also show you C & O Exhibit 23 and ask you -- the car certificate exhibit -- and ask you whether or not that is the same certificate that you use in Western Territory?

A. That's the same one that is issued in triplicate and tacked on the inside of the car by the inspector that what we call O.K.'s a car for explosive loading.

And, when the car is loaded, one of these is tacked on each side of the car and one is filed with the Agent at the station from which the car is billed.

Q. I hand you C & O Exhibit 24, and ask you whether or not that is the placard that is used in Western District, labeling cars of explosives?

A. That's the same card we use in the West.

Q. Mr. Mahoney, did you see C & O Exhibit 25, which covers the Gateway Yard of the Pittsburgh & Lake Erie Railroad?

11,927 A. Yes, and I have been there several times.

Q. Is that yard typical of a hump yard, of a modern hump yard?

A. Yes, it is. Some may have a little more grade, some less, but the layout of the cars being shoved up to the apex of the hump then it is cut off from the rest and permitted to roll by gravity into the various classification tracks, is the same as all humps.

Q. Do the railroads in the Western District instruct their employees in the handling of explosives in the manner that Mr. Birk testified?

A. Yes, they do. Some carriers have continuous classes of rules examinations and the handling of explosives is part of that discussion or examination when they have the classes, in addition to these posters and the pamphlets that they distribute to the various classes of employees.

Q. I take it from your testimony, Mr. Mahoney, that you heard Mr. Birk testify?

A. I did. I was present.

Q. Do you confirm the testimony he gave with respect to the handling of explosives cars?

A. Yes, I agree with Mr. Birk's testimony. There may be some difference as between Districts, but generally speaking, what Mr. Birk testified to as to switching, inspections, and all, corresponds with what we have in the Western District.

11,928 Q. Mr. Mahoney, I hand you C & O Exhibit 26, which is the time study that Mr. Birk testified to while he was on the stand.

Have you examined that study?

A. Yes, and I have discussed this several times with Mr. Birk.

Q. Are they representative of the times taken in the handling of explosives in the Western District?

A. Yes, they are; they reasonably parallel the times that we developed in the West.

* * *

11,929 Q. Mr. Mahoney, is there any difference in so far as the handling of explosives in the Western Territory and Western District is concerned, as compared to the Exhibit 26 which you have before you?

A. There is very little difference. There is some difference, maybe a little in car detention.

Q. Would you indicate just the differences, then, Mr. Mahoney?

A. In Item 2 and in Item 6 where it shows "car detention," I think the time would be somewhat less in Western Territory. I make that statement because I personally visited all of the Agencies or Billing Agents of the seven Munitions Depots on the Santa Fe Railroad, and the car detention inside of the plants for loading was less than five days.

11,930 That's the only difference.

THE COURT: Mr. Mahoney, is it my understanding now, or do you agree with this, that with the exception of these one or two slight differences you have mentioned, that your testimony would be substantially the same as Mr. Birk's testimony with respect to C & O Exhibit 26 which you have in front of you?

THE WITNESS: That's correct, Your Honor.

THE COURT: Instead of going through each item by item?

THE WITNESS: Yes, that's correct.

THE COURT: All right. The jury will understand that, of course.

THE WITNESS: There is one thing, if Your Honor please, I think I should mention to the jury.

THE COURT: All right, you go right ahead.

THE WITNESS: That is, that I feel that in the West we hump more cars in the classification of trains than they do in the East.

BY MR. WHEELER:

11,931 Q. Have you prepared an exhibit to indicate that, Mr. Mahoney?

A. Yes, I have. I have it here.

MR. WHEELER: Mark this exhibit, please.

THE CLERK: No. 15, defendant, the Chesapeake & Ohio's Exhibit No. 27 for identification.

(Thereupon a document, study of Western Lines, re flat and hump switching, was marked Defendant No. 15 (C & O) Exhibit No. 27 for identification.)

BY MR. WHEELER:

Q. I hand you what has been marked as C & O Exhibit No. 27 for identification, and ask you if that is the study to which you refer?

A. That is. It is the results of our study with the Western Lines with respect to the volume of traffic, flat switch, hump switch, and what they identify as through traffic that is not switched at intermediate points.

MR. WHEELER: Your Honor, I offer this in evidence.

THE COURT: Any objection?

MR. WRIGHT: No objection.

THE COURT: It may be admitted in evidence.

11,931-A (Thereupon study of Western Lines re traffic and switching, Defendant 15 (C & O) Exhibit No. 27, was received in evidence.)

BY MR. WHEELER:

Q. Mr. Mahoney, do you know what percentage of the explosives cars in the Western District in 1956 were shipped in multiple car movements?

A. In 1956 Santa Fe records show a total of 826 carloads of explosives shipped.

Of that 826, 356, or 43 per cent, was multiple shipments.

Q. Do you believe that would be representative of the Western District?

A. I think it will in the West, where we have so many storage and transit points on Western Railroads.

Q. Mr. Mahoney, are you familiar with the handling of explosives under wartime conditions?

A. Yes, I am.

11,932 Q. Are you familiar with the handling of explosives under wartime conditions?

A. Yes, I am.

Q. Were the railroad operating conditions during World War II the same as they were in 1956?

A. No, there was a marked difference in the operations of trains and handling traffic in the war years compared with 1956.

Now, for the period 1942 to 1945, when I was in charge of transportation of the Santa Fe Railroad, we handled in excess of 126,000 carloads of explosives and, during the Korean War we handled 35,700 cars of explosives and reported those movements quarterly and annually to the Interstate Commerce Commission.

Q. What was the situation with respect to Class A box cars during World War II as compared to the year 1956?

A. I served the railroads during three wars: World War I, World War II and the Korean War. In World War II freight cars of this country were dislocated worse than at any other time in my railroad experience and when equipment gets so badly dislocated and doesn't get on owners' lines very often, the equipment deteriorates very fast.

THE COURT: Excuse me. What do you mean by "dislocated?" Can you explain that. I do not quite follow that. I would like to know what you mean by that.

11,933 THE WITNESS: Well, I have some figures here, your Honor --

THE COURT: Well, maybe I should not have asked you that.

THE WITNESS: I think you should. It is a very good question. I have got a record of the Santa Fe box cars that are on Santa Fe rails, over a period of years. Prior to World War II the Santa Fe at all times would have say, approximately 80 per cent of its own box cars on lines.

During World War II, in 1943 and 1944, it got down to sixteen per cent, and all the rest of them were on foreign railroads.

BY MR. WHEELER:

Q. When you state "foreign railroads", you mean other railroads in this country, though, do you not?

A. Well, in railroad parlance, that is what we call the Pennsylvania or New York Central. They are a foreign railroad.

Now, another thing along that line, I think the jury ought to know is that no railroad spends a great deal of money on a foreign car. That is why the cars deteriorate so fast.

When a car gets on home rails, what we call home rails, then we repair the car. In addition to that, if I had a New York Central car, a Class B box car, on my railroad -- and when I say "my railroad", I am

speaking of the Santa Fe -- I would upgrade that car to a Class A car, the New York Central wouldn't pay me for the repairs because I upgraded the class of that car. That is one other reason why equipment in this country deteriorated so fast.

11,934 Q. Now, did this affect your ability and the cost of handling explosives in World War II?

A. Yes, very much.

Q. Why?

A. I did what the Santa Fe did in protecting explosives loadings -- and I am sure that is typical of what other western lines had to do: In 1942 to 1945 we had a large number of 36 foot, 80,000 carrying capacity, and 60,000 carrying capacity box cars in services -- the super structure of the cars was wooden.

Now, the other fifty per cent was all steel cars or super-steel construction, and those were the cars that we would have to select and condition for explosives loading.

While I was in charge of the transportation for the Santa Fe, I run special trains of empty cars out of California, out of Kansas City, out of Houston, Texas, into New Mexico, Colorado and Arizona where we had large movements of explosives traffic.

Now, when you got to those -- got those cars to those repair points where cars were selected and conditioned, some of those cars were held, maybe 8, 9, 10 days, for loading, because you could not afford to let loose of cars that were suitable for explosives because you could not replace them in a short period of time. So, there were some car-day delays in furnishing the cars, in addition to handling these special trains.

11,935 In addition to handling the special trains I had out, I personally issued these instructions to all parts of the area, to all our employees that cars that were a potential explosives car suitable for explosives loading, those cars should be sent to New Mexico, Arizona and California and that required a great deal of switching in our terminals to switch those cars out and bill them. We waybilled those cars on what we called a company waybill to ehse shop points where the cars were conditioned for explosives loadings.

Now, that condition did not prevail in 1956 because, from World War II up until 1956, the railroads of this nation put in service 426,000 - plus 100,000 carrying capacity cars of all super-steel construction. So we had a better quality of car to select our cars from in 1956, and that did not require the extra train service, the extra switching, and in some instances, not so much repair work or conditioning work by the car repair forces.

11,936 Q. During World War II did you encounter any extraordinary conditions with respect to your labor force that increased your costs?

A. Yes, we did. When the impact of World War II came on the railroads of this country, immediately we were in an acute shortage of manpower: Locomotives, passenger and freight cars, to move war material.

We hired over 25,000 new employees in three years on the Santa Fe. Our total employment jumped from about forty-five or fifty thousand up to seventy-thousand or seventy-two thousand employees.

Now, during that period 13,000 of our employees went into the service. So, we had to replace those and with all these new employees, we did not get the efficiency out of manpower that we did when we had our experienced employees who were in service. So that was another thing we had to overcome.

Q. Was the Santa Fe fully dieselized during World War II?

A. Oh, my, no, no. We had very few diesels in freight service. We had about 20, I think, in freight service and about 24 in passenger service. I have a statement here from 1935 to 1956, showing the freight passenger and switch diesel locomotives put in service.

Now, in 1942 we had 20 freight diesel locomotives and 24 passenger locomotives, 44 switch locomotives.

11,937 In 1956 we had 1,060 diesel locomotives and in passenger service we had 301; and in switch service we had 355.

So, we were totally dieselized, completely dieselized in 1956, compared to what we had before.

Q. Did this have an effect on your cost of handling explosives traffic in 1956 as against World War II?

A. I would say it would, very materially. We did not have to go through so many miles of extra train service to get cars located for service, the extra switching in terminals to switch out these cars and, of course, our diesel locomotives were much more efficient than our steam locomotives. So, it was cheaper to handle traffic, including explosives.

Q. Did you encounter any congestion during World War II in the handling of ammunition and explosives which was not present in 1956?

A. Yes, we did. Our terminals and ports on the Pacific Coast became very congested, and the Western Defense Command, U. S. Army No. 9 requested that the railroads in the West establish regulating stations. These regulating stations were set up at Albuquerque, New Mexico, El Paso, Texas, Spokane, Washington, and Salt Lake City.

11,938 Now, certain railroads handling traffic to the Pacific Coast would make a detailed report of all war materiel, showing the initial, the car number, the consignee, and the consignor. That is, the shipper and the receiver of that freight.

They, in turn, would dispatch that information to the headquarters at San Francisco, and San Francisco office of the Western Command would notify the carrier what traffic to bring through to the ports or to set it off some place and await further instructions.

Now, under those conditions a good many of the terminals -- I suppose, for the benefit of the jury, I should say what a terminal is. We call a terminal on the Santa Fe where trains are switched and classified generally, where train crews and engine crews change. That is what we call a terminal. Now, we do have some places we call sub-terminals, where we might have one local freight train a day operating out of that territory to take care of a branch line territory, fruit and vegetable territory, or a lumber territory. We move that traffic into those Western terminals until they were filled and we had to retain some tracks for the classification of trains passing through, and we set some trains out at the intermediate stations where we would have just the siding -- maybe the siding would hold eighty or ninety cars, we would fill that up. Then the engine, crew and caboose would go into a terminal and tie up.

11,939 Maybe the next day, the Western Command would order cars out of that particular train we set out some place, and we would have to call the crew, call the train crew and an engine crew and locomotive and go to that station and switch out those particular cars. We could not take them all. We just had the cars that they wanted. Then we would run those into the ports for certain movements -- convoys, as we used to call them in those days -- and load up with men and war materiels for a convoy into the Pacific.

Q. Did this affect your cost, Mr. Mahoney?

A. Yes, because when you set out trains at the intermediate points, the train crew and engine, they take the caboose and they operate over part of the district with just the caboose. Then when you call a crew to go out

and pick out certain cars, that is a very light train up to where you are going to switch it out, and then sometimes you switch out ten, twenty or twenty-five cars maybe out of sixty or eighty, and take it and leave the balance there. So, light train operations are expensive. You do not get the maximum utility out of your locomotives or your crew.

Q. Did the congestion at the ports and at your terminals increase car detention time?

11,940 A. Yes, very much, particularly at the ports.

Q. Did you do any switching within government arsenals during World War II that you do not do normally or did not do in 1956?

A. Oh, yes, practically all of the large arsenals located on the Santa Fe Railroad. The Santa Fe furnished the switching service inside of those arsenals, of what we call "inside the fence" for as high as six months at some points, until the government could get their diesel switching locomotives and get them into the territory.

Q. Did you receive any extra compensation for that?

A. No, we did not.

Q. Were shipments of explosives given special or preferred handling during World War II as compared to other traffic?

A. Yes, not only explosives shipments, but all war materiel; in fact, on May 24, 1942, I personally instructed all employees on the Santa Fe Railroad to give preferential movement to all war materiels over all civilian traffic, including perishable traffic moving under refrigeration?

Q. Did this increase your cost situation?

A. Yes, it did.

MR. WHEELER: I think that is all the direct examination.

THE COURT: Any questions?

11,941 MR. WRIGHT: No cross examination

THE COURT: No cross examination. Thank you, Mr. Mahoney.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MR. WHEELER: Mr. Walter Wright.

Thereupon WALTER WRIGHT a witness called by Mr. Wheeler, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. WHEELER: Your Honor, I have spoken to Mr. Wright about this. Mr. Walter Wright, the present witness, is slightly hard of hearing. It is easier for him to understand me if I move up closer.

THE COURT: All right.

BY MR. WHEELER:

Q. Will you please state your name and address?

A. My name is Walter Wright. My address is 2001 Terminal Tower, Cleveland 1, Ohio.

Q. What is your occupation, Mr. Wright?

A. I am presently employed as Executive Consultant, Revenue Research, for the C & O Railway.

Q. Where did you receive your education?

A. I am a graduate of Oberlin College, having majored in business administration.

11,942 Q. Please briefly outline your experience.

A. I was first employed in railroad work in 1930 when I was a clerk with the Bureau of Railway Economics which is now a part of the Association of American Railroads.

In 1933 I became statistician for the Railroad Division of the Reconstruction Finance Corporation. From time to time I was promoted until I became an Examiner for the Railroad Division.

In 1948, realizing that the Reconstruction Finance Corporation was about to go out of business, I accepted employ with the C & O Railroad in the President's office. Subsequent to that time my work has been primarily in the field of cost analysis, in the finance department of the C & O Railroad.

Q. Mr. Wright, how many years have you spent in cost accounting and statistical work?

A. Oh, I could say, all of my railroad work has been of a statistical and cost analysis work character, with the exception of some time in finance. The government work extended from about 1933 - 1948 -- about fourteen years or so.

Q. Since that time you have been with the C & O doing a similar type of work?

A. Yes.

11,943 Q. Can you tell us a little bit about the work you did with the RFC?

A. The RFC, as you know, was an agency which loaned money to various companies when they got in financial difficulties in the depression of the '30's. Frequently a railroad would have borrowed money from various people. They would get into financial difficulty. They would come to the RFC and ask for additional funds. We would loan the funds, taking as security certain bonds, or a mortgage on part of the property of that railroad.

As the depression went on, many of these railroads went bankrupt. That called for an evaluation of the relative value of the property secured by one mortgage, as over and against the property which secured the loans made by the RFC.

Now, in order to do that, the acceptable method is to compare the earnings of each mortgaged piece of property --

Q. When you say "mortgaged piece of property" --

A. -- and compare that with the cost of operating that piece of mortgaged property, and the balance between the two would give you an indication of the earnings of the property.

Q. Now, the properties to which you referred and on which you worked, I believe you said were railroad properties?

11,944 A. Yes.

Q. Now, will you please briefly describe your work with the C & O?

A. Since coming with the Chesapeake & Ohio, I have been, to a large extent, involved in making cost studies as to whether or not certain traffic is profitable. That means the traffic department would probably call me up and say"We have an opportunity to obtain some new business, but we cannot make the rate any higher than so much. Can we make any money at it?"

My job is then to stack up the costs so I can tell the traffic department "Yes, that traffic will be profitable at that particular rate."

Q. Have you presented cost studies to the Interstate Commerce Commission?

A. Yes; as an outcome of the situation I was just explaining to you, frequently the rate will be published by the railroad, and someone may complain. Now, when that complaint is made, the Interstate Commerce Commission will have a hearing-- just as we are having a hearing here today, you might say -- and at that hearing I will be requested to present cost evidence to prove that the rate is compensatory, that we make a profit.

Now, Mr. Wright, will you please briefly describe the purpose of your testimony here today?

11,945 A. The purpose of my testimony here today is somewhat similar to that which I just mentioned that I would present to the Interstate Commerce Commission. That is, I intend to show that the rates on explosives were compensatory at the rate reduction.

Q. What rates do you refer to?

A. Section 22, 45 per cent First Class for the first 40,000 pounds, and 36 per cent for all weight in excess of 40,000 pounds.

Q. That is to say the rates that were put into effect in 1955 and 1956 by the railroads?

A. That is correct.

MR. WRIGHT: I do not want to interrupt Mr. Walter Wright's testimony -- we have a continuing objection to the materiality of this.

THE COURT: That is correct. That is understood.

BY MR. WHEELER:

Q. I believe you said you followed the procedures in preparation of your study that you will present here, that you will follow in preparing the study for the Interstate Commerce Commission?

A. If I understood your question, it was: Is this presentation along the same lines as I would present before the Interstate Commerce Commission?

Q. Yes.

11,946 A. Yes, I would say that I would make exactly the same presentation to the Interstate Commerce Commission if I had this problem and was testifying about them.

Q. Mr. Wright, would all railroad cost analysts follow the same procedure in preparing a cost study for the Interstate Commerce Commission?

A. Well, I could say that there may be some minor differences or minor adjustments that would be made, depending upon the particular purpose of the study in mind.

Now, here in this case, the point that I am trying to prove is that the rates were compensatory. Now, in starting out with this study, I realized that I had a good margin of safety. I felt right from the start that these rates are sufficiently high, that I will not have to sharpen my pencil too carefully. So, whenever there came an area of judgment in which I could decide a question one way or another, I resolved those on the high side in order to simplify the procedure and to eliminate possible argument.

Now, I might say that the kind of thing I am thinking of would be something like whether I should use average weight trains, or whether I should use through - train costs, or whether I should use a waytrain cost. I resolved this by taking the average weight train. I did that because the average weight train would give me a slightly higher cost than I would obtain If I had separated this between a way freight and a through freight, and this was due to the generally longer haul of explosives traffic.

11,947 Q. Mr. Wright, is the preparation of a cost study of the kind that you made for presentation here, difficult?

A. Well, when I started out in this work, I would say that I thought they were quite difficult. But, gradually, as time goes on and you get the hang of what you are doing, why I find that they are less and less difficult. But I do realize that they can be quite technical. For that reason, I am going to try to present this in just as simple language as I can.

Q. Just to give us a brief outline as to the nature of the study that you will present, how would you go about determining the cost of a movement, say, from Crane, Indiana, to St. Julians Creek, Virginia, two points that your railroads transport explosives to and from, and which have been mentioned by previous witnesses?

MR. WRIGHT: The Court please, I would suggest that, first, he tell us what he did do, and we know what happened and what his study is before he goes into these questions of what he might do.

THE COURT: Yes, I think so, If you put that in the form of an objection, I will sustain it.

Let us find out what he did, first.

11,948 BY MR. WHEELER:

Q. Mr. Wright, does the Interstate Commerce Commission indicate how a cost study should be made?

A. Yes. The Interstate Commerce Commission has gone to considerable trouble in developing an office which devotes all of its time to the building up of methods of determining costs and making studies as to what the cost of handling average traffic is. They have developed a very complex formula which, when applied, will develop the cost of handling average traffic.

Q. Now, do they also provide methods of determining the cost of handling specialized traffic such as ammunition and explosives?

A. Yes, in connection with one of their publications they have a description of how to adjust these average costs so as to reflect specific pieces of traffic. They give you methods of adjusting them or a different number of yard-engine minutes required to originate cost; or to give lengths of haul; well, there are just a large number of adjustments that can be made. You will see these later on.

Q. Now, Mr. Wright, did you have the testimony of Mr. Birk and Mr. Mahoney?

A. Yes, I did. As a matter of fact, the testimony which I am about to present has been worked out with these men. I have been in touch with them and conferred with them a number of times as to the factors to go into this cost study.

11,949 Q. Is your study based in part on C & O Exhibit 26, which I hand to you?

A. Yes, it is based on exhibit 26 of the C & O.

Q. Is it also based on C & O Exhibit 27, which was presented by Mr. Mahoney?

A. Yes, it is also based on exhibit 27, introduced by Mr. Mahoney.

Q. When you talk about the cost of moving traffic, Mr. Wright, what type of costs do you refer to?

A. Well, railroad costs are divided into, you might say, two major categories: Fixed costs and out-of-pocket costs.

Q. Will you please tell me what out-of-pocket costs are?

A. Out-of-pocket costs are costs which are incurred when we actually move traffic. They are costs which are associated with that traffic, because when we move a car, we are going to have certain costs which are attached to that car.

Q. How would you distinguish that from fixed costs?

A. Well, fixed costs are those costs which continue regardless of whether we have any traffic or a lot of traffic.

11,950 Q. Now, the term "fully distributed costs" has also been used here. Would you indicate what that term encompasses?

A. Fully distributed costs are the sum of the two: That is, that would be the out-of-pocket costs plus a pro rata share of the fixed costs.

Q. Now, can you give us some examples of out-of-pocket costs?

A. Excuse me, again?

Q. Can you give us some examples of out-of-pocket costs?

A. An out-of-pocket cost would be something like crew wages, or fuel for locomotives. If we operate an additional train, we have to reach in our pocket and pay the train crew. We have to reach in our pocket and buy some fuel for the diesel locomotive. These are costs which increase as we operate more trains.

Q. Now, can you give us some examples of fixed costs?

A. Fixed costs, as I said, are those that continue, whether we have any traffic or not. A good example would be interest on our bonds, - in order to build our railroad we had to borrow money. We issued a mortgage on the property. Whether we operate no trains or we operate a thousand trains, we still have to go out and pay the holder of that mortgage for the use of his money. It is just as though you had your own residence, and you have a mortgage on your house. Whether you take a month's vacation or not, the holder of the mortgage has got his hand out and he wants his interest. The same way with the railroad. We have to pay our interest whether we operate one train, 100 trains or a thousand trains. These costs are then fixed regardless of the amount of traffic.

11,951 Q. Could you give us a few more examples of fixed costs?

A. Well, like painting your stations, I could say. Regardless of how many trains we may operate, we would still have to paint our stations

every three, four or five years. You might say cleaning ditches. Regardless of how many trains we operate over our track, we will have to clean the ditches out according to the number of rainstorms we have, which is entirely independent of the number of trains we have got running.

Q. Now, Mr. Wright, I do not want to confuse the issue, but are there some costs that are fixed, are partially fixed and partially out of pocket, that is to say, that vary in accordance with the number of trains that you run?

A. Well, yes, we have some that are part fixed and part variable. I think I could give an example of that as, for example, saying rail, or the rails that the trains operate on.

11,952 Certainly that is by the number of trains that run over the rails. They are exposed to elements and weather, all of the time. Regardless of whether we operated no trains at all, there would still be some deterioration of the tracks.

Now, those areas, having been subject to considerable study, and engineers have provided a basis upon which acceptable normal experience, as to what portions are fixed and what are out of pocket.

Q. Has the ICC established a formula for that?

A. The ICC has established a more or less composite formula. They have made extensive studies as to how much of a railroad's expenses are out of pocket, and how much of them are fixed. They came up with the conclusion that 80 per cent of the operating expenses, rents and taxes, were out of pocket. The remaining 20 per cent were fixed.

Q. Now, Mr. Wright, you have used the word "fixed." As I recall it, the ICC in some of its studies which you used, also uses the word "constant." Are the two terms interchangeable?

A. I would say that they are the same word, just used interchangeably.

Q. Now, Mr. Wright, are there any other observations that you think you should make at this time which would help the Court and the jury in following your description of your study?

11,953 A. Well, I think it would be well to point out the extent to which this fixed and variable relationship extends all the way through railroad costing. For example, I have just mentioned the relationship of fixed and out-of-pocket costs of the railroad as a whole. Now, the same thing applies as to length of haul. That is, we will have what we call "terminal costs." Now, the terminal costs are fixed in relationship to the distance that a car moves, we have to go through exactly the same terminal motions regardless of whether that car moves one mile, ten miles or a thousand miles.

Q. Can you illustrate this better at the blackboard, Mr. Wright?

A. Yes, I think I could.

MR. WHEELER: Your Honor, do you mind if we go to the blackboard for that?

THE COURT: You had better erase what is on there.

MR. WHEELER: Very well.

(The witness went to the blackboard.)

BY MR. WHEELER:

Q. I think you will have to write a little larger than that, for everyone to see.

11,954 A. I have drawn here two diagrams. This top diagram I have here illustrates what I have just been talking about -- fixed, and out-of-pocket costs. Now, regardless of what volume we have, if we measure this in cars, we are going to have a certain amount of fixed cost. This is the

interest on our debt, the painting of our stations, the cleaning of our ditches.

Now, for each additional car that we handle, we will have a cost for one car, two cars, three cars, and this out-of-pocket cost will gradually increase as the volume increases.

Q. Now, you say "volume" --

A. Now, I might say --

Q. You say "volume." Do you mean the number of cars and the number of tons?

A. The number of cars, the number of car-miles, whatever measure of volume we may use.

Now, I might say that this is something like owning an automobile. If you own an automobile, you may not think in terms like this, but it is the truth that you will have to buy some tags, you will buy some insurance, and that will extend over a year regardless of whether you drive that automobile one mile, 100 miles or 1,000 miles. And so you have a fixed cost of operating your automobile. You have a fixed cost of operating a railroad.

11,955 Then, on top of that, as you use your automobile, you are going to have to buy gasoline. The more miles you drive, the more gasoline you buy, and so you have there a combination of your out-of-pocket and your fixed cost.

Now, on the lower chart here I have done this: I have taken the fixed costs here and distributed them over the volume. If we had only one car that we handled, we would have a terrific amount of fixed costs for that one car, to be borne by that one car.

If we have ten cars, it would be one-tenth. If we had 1,000 cars, we would divide by 1,000. So, each time the unit cost comes down.

If our fixed costs here with a million dollars, and we had only one car, this line would be all the way up to a million dollars. If we have 1,000 cars, I would divide that million dollars by 1,000 and I would come up with $100 per car.

If I divided that by 10,000, I would come up with ten, so gradually the unit cost comes down, as our volume goes up.

Now, the second illustration I want to make here is that the same pattern appears regardless -- in relationship with the distance that the car moves. We have terminal costs, and these terminal costs are fixed, regardless of the number of miles. That is "Miles" here, and I think I will put "Miles" here (drawing on blackboard.)

11,956 Now, when we are offered a carload of explosives or a carload of any freight, we have to do certain things. We have to go find a car. Then we have to clean that car. We have to inspect that car. We have to take that car and put it at the shipper's siding.

The switch engine would go away and come back the next day and get that car, bring it into a classification yard, classify it in the direction it is going.

Now, whether that car moves one mile, or whether it moves a thousand miles, we have to go through exactly the same motions.

Now, if the cost is then $100, say, to perform those terminal costs, if the car goes one mile, the unit cost is $100: If it goes ten miles, it comes to ten dollars. If it is 1,000 miles, it is 10 cents.

What I am illustrating here is that the greater the distance we move traffic, the lower our costs become.

Now, there is a third phase on this that I think I should point out. That is the question of "Load."

Now, once we have a car of traffic and we are going to move it from A to B, or from Crane, Indiana to St. Julians, or whatever it is that we are going to move it, we have a certain cost per carload. That cost per carload is fixed. Plus the fact that the greater weight that we put in that car, the more fuel our locomotives will consume. There will be some other incidental expenses. So, we have a fixed cost, you might say, per car, plus an additional cost for each ton that is in that car.

11,957 Now, if we say that the cost here to move a particular piece of traffic or a carload is $500, if we have but one ton in here, the unit cost is $500. If we put ten tons in that, we divided the $500 by ten and we will get $50 --

Q. Per ton? A. What?

Q. Per ton?

A. $500 per car, with ten tons in it -- did I say ten? With ten tons in it, that would be $50 per ton.

Q. Per ton? A. Per ton.

If I had 50 tons in it, it would then come down to $10 per ton. So, again we get this decreasing picture which, as the load in the car increases, the unit cost per ton goes down.

That is the end of my presentation on the blackboard here . .

Q. In other words, as I understand you, Mr. Wright, as you increase the number of cars you move, or as you increase the number of miles that you take the car, or as you increase the load in the car, your cost per unit -- that is, per ton, in the car decreases.

11,958 A. Yes.

Q. And that is true, this is a peculiarity of railroad cost accounting or costing?

A. Yes, it is the interplay of all three of these, you see. We must evaluate in making a cost study for any particular traffic.

I might say this is one of the inherent advantages of a railroad, this decreasing unit cost, as our load increases, our distance increases and the volume increases.

Q. O. K.

(The witness resumed the witness chair.)

Q. Mr. Wright, is there a formula or method which takes into account the fundamental principles of railroad costs which you have just described at the blackboard?

A. Yes. The ICC has developed a formula which evaluates the characteristics which I have just demonstrated.

Q. Do you have a copy of that ICC formula?

A. Yes.

DEPUTY CLERK: No. 15 Defendant, Chesapeake & Ohio's Exhibit 28 for identification.

11,959 (No. 15 Defendant C & O Exhibit No. 28, being Railroad Form A-7-57 "Formula For Use in Determining Rail Freight Service Costs" Prepared by the ICC was marked for identification.)

* * *

THE COURT: I take it this exhibit that was given to Mr. Wright or to counsel sometime ago, was it?

11,960 MR. WHEELER: Yes, sir. I think on May 12.

THE COURT: All right.

BY MR. WHEELER:

Q. Mr. Wright, I refer you to a document marked by the clerk as C & O exhibit for identification No. 28. Is this the document to

which you referred in your prior testimony?

A. Yes.

Q. Will you state what that document purports to be?

A. This document is known as rail form A-7-57 "Formula for Use in Determining Rail Freight Service Costs." Prepared by the ICC Cost Finding Section.

It is the Interstate Commerce Commission's method of evaluating the demonstration I just made on the blackboard.

MR. WHEELER: Your Honor, I offer C & O Exhibit 28 in evidence.

THE COURT: This will be over the objection -- All right, it may be received.

(C & O Exhibit No. 28 is received in evidence.)

* * *

11,961 Q. To be perfectly clear about this, Mr. Wright, I notice a legend on the bottom of this exhibit which reads "This study issued as information has not been adopted by the Interstate Commerce Commission."

Do you have any comment to make with respect to that statement?

A. This inscription appears on a number of the Interstate Commerce Commission's documents. What it means is that you may use this formula in presenting a cost study to the Interstate Commerce Commission. But it is not absolutely necessary that you use this particular formula. You may use some other approach, if you care to. However, my own experience has been that as the ICC has gone to tremendous expense in preparing this formula, they understand it, they have a department that spends all its time studying this formula and applying this formula, that it is much better to use a formula that they understand in attempting to convince the Commission that any particular rate is compensatory.

11,962 BY MR. WHEELER:

Q. Now, what use is made of this formula in preparing a cost study?

A. Excuse me. I did not hear you.

Q. What use has been made of this formula by the Bureau of Accounts, of the ICC?

A. The ICC takes this formula and also the annual reports of the various railroads. They combine these reports and apply this formula on a regional basis. It will collect the railroads for the Eastern District, and apply this formula for the Eastern District. They will do the same thing for the Pocahontas Region, for the Southern Region and for the Western District.

Q. When they have done that, do they publish the results of the formula contained in exhibit 28 with the information supplied by the railroads?

A. Yes. The Interstate Commerce Commission publishes annually a statement known as "Rail Carload Cost Scales by Territories."

The one I have here in front of me is as of January 1, 1958.

DEPUTY CLERK: No. 15 Defendant, C & O Exhibit No. 29 for identification.

11,963 ("Document titled "Rail Carload Cost Scales by Territories" dated January 1, 1958 is marked No. 15 Defendant C & O Exhibit No. 29 for identification.)

BY MR. WHEELER:

Q. I hand you what has been marked for identification C & O Exhibit 29 and ask you if that is the document to which you refer?

A. Yes, this is the document to which I refer. I think that I should point out here, though, that this exhibit is not a complete reproduction of the statement that I just held up before you.

I have omitted from it tables No. 1, 2 and 3, inasmuch as I did not rely upon them in the testimony that I am about to present.

If anyone cares to examine it, the complete copy, I have it here.

Q. Suppose you tell us what tables 1, 2 and 3 are, what function they serve in the publication put out by the Commission.

A. In applying this formula, the ICC will use the reports of a specific year. By the time the railroads have reported they have applied this formula, they have published it, considerable time has elapsed.

11,964 So, the Interstate Commerce Commission raises the figures obtained by application of this formula, so as to reflect current wage and price levels.

Tables 1, 2 and 3 -- which I did not refer to in here -- has been raised to the level of January 1, 1958.

By confining myself to the Table 4, I was able to base my costs on actual results of 1956.

Q. Now, let me see if I understand you, Mr. Wright. You mean that Tables 1, 2 and 3 merely take the basic 1956 figures and modify them to reflect cost and price increases in 1957 and 1958?

A. Yes, that is correct, for the year 1958.

Q. Yes.

A. They raise them for the wage and price increases subsequent to 1956, so as to reflect the price level as of January 1, 1958.

Q. Since you were using the year 1956, they were unnecessary for any purpose in your study?

A. That is correct. They were unnecessary.

MR. WHEELER: Your Honor, I offer C & O Exhibit 29 for identification into evidence.

THE COURT: It will be received over any objection.

(C & O Exhibit 29 is received in evidence.)

11,965 MR. McGLOTHLIN: Just to keep my record clear, I do not think I have a note of what the objection is.

I am trying to keep track of it.

THE COURT: Will you re-state the objection?

An objection on the ground of materiality.

MR. WRIGHT: That goes to all of these.

THE COURT: That goes to all of this testimony.

MR. WRIGHT: Yes, sir.

THE COURT: Very well.

MR. RHOADS: Your Honor please, I wonder if Mr. Wheeler could give us the description of 29, again?

MR. WHEELER: Yes, sir.

Exhibit No. 29 is the rail carload cost scales by territories, as of January 1, 1958.

THE COURT: Let me ask you this, Mr. Wheeler: Did the witness say he used this in connection with his study?

MR. WHEELER: Yes, sir.

THE COURT: As to the year 1956?

MR. WHEELER: Yes, sir.

THE COURT: All right.

MR. WHEELER: You will note that right under that there is a subheading "Based on Year 1956 Operations, With Adjustment to Reflect Wage and Price Levels as of January 1, 1958."

11,966 MR. RHOADS: Thank you, Mr. Wheeler.

BY MR. WHEELER:

Q. Is this the document which you previously referred to as showing how you can develop the cost for a particular commodity such as explosives?

A. The cost factors developed in this scale are for average traffic.

Q. How do you adjust them -- well, does this exhibit tell you how to adjust those average costs to reflect the cost of handling a particular commodity?

A. The scale which begins on page 74 of this exhibit 29 contains the unit costs for average traffic.

In the front of this exhibit, beginning with the explanatory statement on page 1 and continuing through page 19, gives a series of explanations and adjustments that can be made so that these scales can be adjusted to reflect specific loads per car, which is, in effect, a determination of the cost of handling different commodities, for different lengths of haul.

Q. In the study that you prepared, did you follow the formula set forth in exhibit 29?

A. Yes.

Q. Please tell the Court and the jury briefly -- and in as non-technical language as possible -- just what you did in the preparation of your studies?

11,967 A. I took the unit costs as shown on pages 74, 76 and 77 and in the light of the additional cost of handling explosives, as described to you by Mr. Birk and Mr. Mahoney, I have increased the cost -- the unit costs shown here, so as to reflect the cost of handling explosives traffic.

Q. Does exhibit 29 tell you how to make those adjustments to reflect the higher cost or lower cost of handling a specific commodity such as explosives?

A. Yes, the description in the front of this exhibit has been followed, so as to increase the costs, so as to reflect explosives traffic.

Q. Have you prepared an exhibit which makes those adjustments?

A. Yes, I have prepared an exhibit which describes those adjustments.

DEPUTY CLERK: No. 15 Defendant, the Chesapeake and Ohio Exhibit 30 for identification.

(A document making adjustments of increased costs reflecting explosives traffic is marked C & O Exhibit 30 for identification.)

BY MR. WHEELER:

Q. Mr. Wright, I hand you what has been marked for identification as C & O Exhibit 30 and ask you to state what that is, whether that is the exhibit to which you have referred?

11,968 A. Yes, it is.

Q. This exhibit was prepared by you?

A. Yes.

MR. WHEELER: Your Honor, I offer in evidence C & O Exhibit 30.

THE COURT: It will be received, subject to objection.

(C & O Exhibit No. 30 is received in evidence.)

BY MR. WHEELER:

Q. Does exhibit 30 tell how those adjustments were made?

A. Excuse me. I did not hear that.

Q. What is the title of your Exhibit 30, Mr. Wright?

A. "Adjustment of Carload Unit Costs, Based on year 1956 Operations to Reflect Extra Cost of Handling Explosives in Cents per Service Unit."

Q. Now, would you please describe exhibit 30, Mr. Wright?

A. I think that I should first direct your attention to page 74 of Exhibit 29.

Q. Please proceed.

A. On line 9, on page 74 of exhibit 29, you will see we have "Average Weight Trains." The line entitled "Box". The figure in column 4 is 17.36494 cents.

11,969 Q. Now, the word "Box" refers to box car?

A. Yes, the word "Box" means box car.

You will note on exhibit 30 I have that exact figure in column 1, line 1.

In column 5, on page 74 of exhibit 29 there occurs the figure ".01085" which represents the line-haul cost per hundredweight mile.

That figure has been transferred to my column 2. If you trace on across the sheet, you will see that what I have done there is copy line 9 on page 74. This is the basic average cost for handling traffic in the Eastern District.

Now, if you will recall the description that I made there on the blackboard, you will see that this exhibit 30 is set up on the same basis as the tabulation on page 74 of exhibit 29. This exhibit shows that, for average traffic, by taking this first line, I can determine the cost of handling that average traffic by allowing 17.36494 cents per car line, plus .01085 cents per hundredweight mile.

To that I should add 5,246.798 cents per carload per terminal cost, plus 1.27900 cents per hundredweight in that car, to determine the terminal cost. Then, by adding the terminal costs to the line-haul costs, I will get what is known as the out-of-pocket cost of handling average traffic.

11,970 Now, in order to determine what the full costs are, that is, what is the out-of-pocket cost plus a pro-rate of the fixed cost of handling --

Q. What do you mean by "pro rate", Mr. Wright?

A. By "pro rate" I mean that I have taken the fixed costs and distributed them over tons or ton-miles, saying that each ton should bear the same proportion of fixed costs as any other ton.

By adding the constant expenses, I will then get the fully distributed cost.

Q. Now, your constant expenses are shown in columns 5 and 6 on exhibit 30, is that correct?

A. They are the constant costs.

Q. They are shown in columns 5 and 6 of exhibit 30.

A. Five and six on exhibit 30 are the unit costs of constant expenses as distributed by the ICC.

Q. And all of the items shown on the first line of exhibit 30 are taken from table four of exhibit 29?

A. Yes.

Q. Of the Interstate Commerce Commission?

A. They were lifted from exhibit 29.

Q. Which is the ICC study?

A. Which is the ICC study, yes. It is their figure. Now, as I stated, that line represents average traffic. The problem we have here is what the cost of handling explosives traffic? And so, in the light of the testimony that was put in by Mr. Birk and Mr. Mahoney, I have made additional calculations which should be added to this average cost in order to reflect the cost of handling explosives traffic.

11,971 Now, the first of these adjustments, you will see on line 2 where I have said "Special Service (Footnote A)". I may point out that for Eastern District, Southern Region and Western District, I have done exactly the same thing.

So, taking line 2 now, with my special services, if you will turn to footnote "A" which is attached, you will see at the bottom of that page the figure 1224.1 cents. That represents the cost of additional inspection time to originate explosives car, as developed by Mr. Birk.

Q. Now, Mr. Wright, right there, I do not remember Mr. Birk giving us any dollars-and-cents figures.

His exhibit contained time.

A. The figure that Mr. Birk put in was time --

Q. Where are those?

A. I have placed a dollar figure on the time put into evidence by Mr. Birk.

Q. Where are the figures that you got from Mr. Birk? Where on footnote "A" are the figures that were supplied by Mr. Birk?

A. Mr. Birk put in a figure for explosives cars, saying that the actual inspection time was 60.417 minutes.

11,972 He also stated that for other box cars it amounted to 39.167 minutes, making an excess of 21.250 minutes.

Q. Now, Mr. Wright, I do not want you to repeat all of the testimony that Mr. Birk gave. But, are the figures that indicate minutes on footnote "A" taken from Mr. Birk's exhibit?

A. Yes, sir.

Q. And then what did you do with those?

A. I placed a dollar sign on them by multiplying the wage cost of the inspector, and adding fringe benefits, payroll taxes, and such things that would accrue to those wages.

Q. Will you proceed?

A. Yes, sir.

Now, going on with Footnote "A", Mr. Birk testified that one out of five cars inspected was rejected. Now, I must then distribute the cost of inspecting those cars that were rejected over the traffic which actually moved. Accordingly, I have raised this 21.25 minutes by 5.3125. Now, as Mr. Birk also testified, it took about three hours or 180 minutes to complete a pre-movement inspection of a car, including the allowance for travel time. I have added 180 minutes, making a total inspection time, including the travel time of 206.5825 minutes which represents 3.443 hours.

11,973 To get the dollar cost of this 3.4434 hours of inspection time, I have determined what the rate of pay was for a car inspector in 1956, which, for ten months of the year was 2.134, for two months was 2.234, making an average for the year of 2.151.

Multiplying this 2.151 dollars by 3.4434 hours, I find that the car inspector's wage cost amounted to $7.406.

Now, in addition to paying the car inspector, we have to provide for certain unemployment insurance. We have to pay for repair and taxes.

We also have to allow for vacation. These are indicated on sheet 2 of this exhibit, on which I have made a calculation that the inspectors, the car inspector's wage should be increased by 11.28 per cent in order to cover these fringe benefits.

That is the figure of .835 dollars appearing near the bottom of the sheet.

Now, Mr. Birk, also, testified that it was necessary for the car inspector to use an automobile in certain instances in order to get to the point where the car was to be inspected.

Q. That's the car of explosives you are talking about?

A. The car for explosives.

Q. The car for explosives?

A. Yes. This amounts to approximately 8 cents per mile.

11,974 As Mr. Birk testified, about 50 miles would be appropriate for the mileage involved. That amounts to four dollars. By adding these figures together, I come to $12.241 as the cost of inspecting a car of explosives. This $12.241 is carried to line 2, column 3 of the Common Expenses, and is included in the addition of the Additional Expenses of Handling Explosives.

Q. That is on line 3, column 3 of the first page of Exhibit 30?

A. Yes.

Q. It is under the heading "Terminal".

A. That is included as a terminal cost.

Q. Now, the next item you have there is Item 3, "Additional Switching at Origin and Destination."

Please explain that item, how you computed it.

A. Are you referring to 4181. figure?

Q. Yes, sir.

A. That is developed on Footnote "B". Referring to Footnote B, the first line as described at the left of the sheet, shows switch engine minutes per box car for average traffic at either origin or destination as per ICC Statement 2-58, page 11.

Now, what I am referring to there is page 11 of exhibit 29.

Q. That is the one with the map of the United States on the outside?

11,975 A. That is it (indicating). On that page you will see that in the Eastern District the average car required 27.5 minutes for Eastern District.

Q. For the average switch?

A. Yes, for the average switch. For the Southern Region it is 17.4 minutes, and the Western 24.0 minutes.

Now, as that is for switching at either origin or destination, in order to obtain the terminal time at both ends of the line, I must double that figure. That is done on line 2. That represents, then, the time required for the average car.

Now, as to explosives, Mr. Birk testified that the time for explosives was somewhat in excess of average. These figures work out to 60.6 minutes, which is comparable to the 27.5 minutes that is, it is just one of the terminal handlers.

This figure then must be doubled in order to reflect both origin and destination, origin and termination.

You will also remember that Mr. Birk testified that 25 per cent -- that one out of 5 cars were rejected. Therefore, for the four years that were accepted, I must add 25 per cent to the normal origin time to reflect the switching of the cars which were rejected. This is 6.9 minutes. By adding these minutes together, I come to a total switch time for explosives of 128.1 minutes, which is 73.1 minutes in excess of the average car. That figure is shown on line 7.

11,976 This 73.1 minutes is 132.9 per cent in excess of the average switching time, as shown on line 8.

Q. Line 8 of what? Line 8 of this exhibit, of your footnote "B"?

A. On Footnote "B". Now, the Interstate Commerce Commission has computed that the 27.5 minutes required to switch the average car cost $15.73. That figure appears on page 79 of ICC 2-58 or exhibit 29.

I must double that to reflect both origin and termination, making the $31.46. Now, applying the excess percentage, the percentage representing the excess time for explosives, that is, the 132.9 per cent, to the $31.46 appearing on line 10, I come to an extra cost of 41.81034 dollars, as being the excess cost of handling explosives in the Eastern District.

The same sort of calculation was made for the Southern Region, and Western District. Again, if you will take this figure of 41.81034 appearing at the bottom of the Eastern District Column on footnote "B" you will find that that appears on the top sheet of this exhibit 30 in column 3 "Terminal Cost Per Carload."

Q. You mean line 3, do you not?

11,977 A. Line 3, Yes, sir.

Q. Why do the Southern Region and Western District costs show up as being less than the Eastern District Costs, Mr. Wright, on Footnote "B"?

A. I do not follow your question here.

Q. Why is this amount for the Southern Region and for the Western District less than the amount for the Eastern District?

A. Oh, yes.

Q. That is to say - why is the switching cost greater in the East than in the South and the West?

A. That's correct.

Q. Why?

A. Why?

Q. Yes.

A. First, we have a lower number of switch engine minutes, to start out with, on average traffic.

Secondly, the increase in minutes is less in each instance.

Third, the original cost per car switched is less as is indicated on line 9. These three factors together combine to make the Eastern Region somewhat higher than the Southern and Western.

Q. Mr. Wright, your footnotes covering the rest of the items on the first sheet of exhibit 30 were prepared in accordance with exhibit 29, the Bureau of Accounts, ICC Bureau of Accounts Formula?

11,978 A. Yes, they are all prepared in accordance with the instructions which appear on the first few pages, the first nineteen pages, I think it is, of exhibit 29.

Q. Were they prepared in a manner similar to that that you have demonstrated in examining Footnote A and Footnote B?

A. Yes.

Q. Now, as I understand it, Mr. Wright, exhibit 30 represents the average cost of handling ordinary commodities, increased as shown in exhibit 29, the Bureau of Accounts, a cost-finding study, increased in accordance with procedures outlined in exhibit 29, so as to reflect the additional time in handling explosives testified to by Mr. Birk and Mr. Mahoney, is that correct?

A. That is correct.

Q. Now, is there any particular item on exhibit 30 which you think requires any explanation beyond that that you have given?

A. No, unless it is that in following exactly the same procedure and the same format as developed by the ICC, the total figures for each of the respective districts here shown on line 9 for the Eastern District and 18 for the Southern Region, 27 for the Western District, represent unit costs for explosives traffic developed from the ICC costs for average traffic. So, I can use these unit costs for explosives in the same manner that the ICC would use the unit cost for average traffic.

11,979 Q. Now, what is the next step in your study?

A. Once I have developed the unit costs, the next thing to do is to apply these unit costs to traffic that is actually handled by the railroads to determine the relationship between the costs and the revenue received for that traffic.

Q. Now, did you obtain any guidance from the ICC studies in determining revenues for comparison with your cost?

A. Yes. The Interstate Commerce Commission issues each year a statement called "Distribution of the Rail Revenue Contribution by Commodity Groups."

I have here the issue which covers the year 1956; on page 51 of that document the ICC has computed the cost of handling explosives as disclosed in their one per cent waybill sample that they collect from all of the railroads in the country.

Q. Please proceed, Mr. Wright.

MR. WRIGHT: Excuse me. Is this from an exhibit in evidence or something that is about to be introduced?

MR. WHEELER: We are coming to an exhibit.

MR. WRIGHT: I just wondered what he was reading from.

MR. WHEELER: He has already stated what it was.

11,980 MR. WRIGHT: No, the number of it.

THE COURT: Is it in evidence?

MR. WHEELER: No, sir, the document he is reading from is not in evidence. The document is the source of the next exhibit.

MR. WRIGHT: Can't we have it marked so that we have a record as to what he is reading from?

MR. WHEELER: I think he already stated what it was. Can you read his statement? (The reporter read the record.)

DEPUTY CLERK: No. 15 Defendant C & O Exhibit No. 31 for identification.

(Statement from ICC, Distribution of Rail Revenue Contribution by Commodity Groups for 1956 was marked Defendant No. 15 C & O Exhibit 31 for identification.)

BY MR. WHEELER:

Q. Mr. Wright, I show you what has been marked for identification as C & O Exhibit 31 and ask you to state whether or not that is taken from the document to which you refer.

A. Yes, it was.

Q. This exhibit was prepared by you, was it, Mr. Wright, from this source?

A. This was copied from the ICC publication that I just held up.

11,981 Q. And the source of exhibit 31 for identification is shown on the bottom of that exhibit?

A. Yes, the source is shown as ICC Bureau of Accounts, Cost-Finding and Valuation Station 6-58, Distribution of Rail Revenue Contribution by Commodity Groups, 1956.

MR. WHEELER: Your Honor, I offer this exhibit C & O exhibit 31 in evidence.

DEPUTY CLERK: Please state what it is for the record.

MR. WHEELER: Yes.

THE COURT: All right, it may be admitted over objection.

(Exhibit C & O 31 is received in evidence.)

BY MR. WHEELER:

Q. Read the caption on that exhibit for the record, Mr. Wright?

A. Title is "Table 7, Revenue Contribution to Burden and other data by Commodity Classes and Territorial Movements, 1956 (Source of Traffic Dollar 1 per cent Waybill Sample)".

(Exhibit No. 31 is distributed among the jurors.)

BY MR. WHEELER:

Q. Mr. Wright, did Statement 6-58 issued by the ICC Bureau of Accounts, contain any other relevant information to your study?

11,982 A. I did not quite get the last half of that.

THE COURT: Will you repeat that?

Q. I notice there is a sheet "2" to exhibit 31. Would you please state what that shows, Mr. Wright?

A. Sheet two -- sheet one of this is marked, up in the upper lefthand corner underneath the heading "6-31-Explosives".

Sheet two is marked "9-60 All Commodities."

That is the two sheets, they show the top sheet, Explosives Traffic. The second sheet, all traffic.

Q. Now, will you proceed with your explanation of this exhibit, particularly as to the other information that this exhibit shows was taken from the way bills furnished to the ICC by the railroads?

A. The Interstate Commerce Commission requires all railroads to present to them one per cent of all of their waybills. They use this to determine the characteristics of the traffic that moves over the railroad. These one per cent - waybill sample studies are rather numerous.

This is one of a series in which the ICC, from its one per cent waybill sample, determines the number of carloads of explosives that move within that one per cent sample. They develop the characteristics of it. For instance, the number of tons that were handled, that is shown --

11,983 Q. Now, this information is all shown on this exhibit?

A. This information is shown on this exhibit.

Q. When you refer to the information, will you please indicate the column in which the information is to be found?

A. Yes. The carloads appearing within the one per cent waybill sample are shown in column 3: The first figure on that and the first line being 303.

The number of tons appearing in the one per cent waybill sample appears in column 4, the first line being 10,881.

Now, by dividing the number of tons by the number of carloads, we can determine the average load per car. That is shown in column 5.

The average haul is also computed by dividing the number of ton-miles involved by the number of tons handled. Those figures do not appear here but appear on the work sheets of the Interstate Commerce Commission. The result of 811 appears in column 6.

The revenue earned by explosives within that one per cent waybill sample is shown in column 7. The Interstate Commerce Commission has then taken these characteristics of load, of average haul, and have determined from that the out-of-pocket cost of handling this traffic.

This appears in column 8 and is shown as 77,523.

11,984 The difference between the revenue shown in column 7 and the out-of-pocket cost shown in column 8 results in the contribution as shown in column 9.

Q. What is contribution, Mr. Wright?

A. Contribution is the excess of revenues above the out-of-pocket expense. It is the amount that a railroad can keep to cover its fixed costs: Dividend payments, such costs which are above the out-of-pocket costs.

Column 10, the ICC has computed the ratio of revenue to out-of-pocket costs. That is, it has divided the revenue by the out-of-pocket costs and finds the ratio to be 446.

Now, what this means is that for every dollar of expense a railroad incurs on explosives, it receives $4.46 in revenue.

In column 11 the ICC has computed the ratio of revenue to fully distributed cost. This shows the ratio at 3.06. In other words, for each dollar of full expense, that the railroads incur, the revenues are $3.06.

Q. You mean to tell me that in handling explosives, the railroads get $3.06 for every dollar of their total cost?

A. That is right.

Q. Their revenues were three times their total costs?

11,985 A. Yes.

Q. Now, Mr. Wright, I notice in column titled No. 1, 631 Explosives, and then it says "U.S. to U.S.".

Will you explain what each of those items is?

A. Well, that is a shorthand method of designating what grouping of traffic is shown on each one of those lines. "U.S." means explosives moving from any point in the United States to any other point in the United States. "Off. to Off." means moving from Official Territory to another point in Official Territory.

"South to South" is from one point in the South to another point in the South, and so forth. We come down to "Off. to South" or "Sou." - that means moving from a point in Official Territory to a point in Southern Territory.

Q. Now, Mr. Wright, certainly there were more than 303 carloads of explosives handled in the United States in the year '56, were there not?

A. Yes.

Q. Why does this exhibit show only 303?

A. 303 is the number of cars that appear within one per cent waybill sample.

Q. So that, presumably, so that to get the total number of cars, you have multiplied this by 100?

A. Yes, that is right.

Q. Now, all of the information on this exhibit was taken from the ICC's own publication, is that right?

11,986 A. Yes. It was merely copied from the source as indicated.

Q. Now, would you explain sheet 2 and its relevance here?

A. Sheet 2 was included for comparative purposes. It covers the same information but for all commodities, rather than just for explosives. The significance of the various columns, and the lines, are exactly the same as I indicated on the previous sheet.

I would like to point out to you, though, this comparison, if you will hold these sheets so as to see the ratio of revenue to out-of-pocket costs on the explosives sheet, you will see that with all traffic moving within the United States, the ratio was 448.

The same figure for all commodities was 142.

Q. You mean that on explosives the railroads obtained $4.46 for every dollar of cost; whereas on all commodities it obtained only $1.42 for every dollar of cost?

A. That is correct.

Q. Will you continue?

A. If we take the next column, we will see that for explosives the ratio of fully-distributed -- the ratio of revenue to fully distributed cost was 3.06 for explosives. For all commodities, the comparable figure is 1.01.

11,987 In other words, for each dollar of expense incurred on explosives, the ICC computed that the revenues were 3.06 dollars, whereas, for each dollar of expense incurred on all traffic, as a whole, the railroads received 1.01 dollars.

Q. Mr. Wright, by how much did the explosives traffic, per dollar, explosives revenue exceed fully distributed costs per dollar?

A. The Interstate Commerce Commission figure here is 3.06 dollars of revenue for each dollar of expense.

Q. Would that mean that they exceeded their fully-distributed cost on explosives by $2.06?

A. Yes.

Q. And they exceeded their cost on all traffic by only one cent?

A. One cent.

Q. Are there any other facts with respect to this exhibit which you want to mention?

A. Yes, there is another point that I would like to bring out on these two sheets: And that's this. If you will turn to the Explosives Sheet, you will find - going down the line "Official to West," we have in the carload column, that is column No. 3, 51 cars.

The next line "West to Official" that is in the opposite direction, we had but 12 cars. Now, what that shows is that the explosives were moving from Official Territory west or into Western Territory; and that there was a much lighter movement from the West to Official Territory.

11,988 Now, turning to page 2, and taking the identical lines, we find that from Official to West we have 7,140 carloads: From West to Official, we have 12,829 carloads. This indicates that the predominant traffic was from West to Official, that it was eastbound or in the opposite direction to explosives.

Q. Is this advantageous from a cost standpoint or disadvantageous?

A. This would indicate that the empty return ratio -- that is --

Q. What do you mean by "empty return ratio"?

A. That is the number of miles that we have to move a car empty in order to get a load. Whenever a car is unloaded at a specific point, a railroad has the problem of moving it to another point where it will find a load. That is just a part of the cost of handling traffic as moving it in the loaded direction: Just as much as that. So, the explosives traffic here, as it moves in the opposite direction to general traffic, there is less likelihood for us to have to move a car empty, so this would reduce our cost of handling explosives.

Q. As compared to other commodities?

11,989 A. As compared to what?

Q. As compared to other commodities.

A. As compared to other commodities. I might add here, too, I made no adjustment in my cost calculation for this. I just took the normal average empty return. So, in that way I probably -- well, I have slightly overstated the cost.

Q. Mr. Wright, since there was available to you from an ICC statement, this study showing the excess of revenue on explosives traffic over out-of-pocket and fully-distributed costs, why did you bother to make a separate study of your own?

A. Well, in view of what Mr. Birk and Mr. Mahoney said, the cost of handling explosives is somewhat in excess of average costs.

Now, the ICC, in developing this study, has used only average costs. It has used the cost which would be shown in the cost scales introduced as exhibit 28. Knowing that explosives were more expensive, I then developed this exhibit 30 which gave me the unit cost for handling explosives which I felt would more correctly portray the actual cost of handling explosives.

MR. WHEELER: Would you mark this?

DEPUTY CLERK: Defendant 15 --

THE COURT: Is this another exhibit?

11,989-A MR. WHEELER: Yes, sir.

THE COURT: I think we will take our recess at this time.

(at 12:25 p.m. the trial was recessed until 1:45 p.m.)

* * *

11,990 DEPUTY CLERK: Defendant No. 15 C & O Exhibit 32 for identification.

(Document entitled "Revenue Contribution to Burden and Other Data for Explosives, Ammunition by Territorial Movements - '56" is marked Defendant 15 C & O Exhibit No. 32 for identification.)

THE COURT: Let me ask you a question before they bring in the jury. Is there any way you gentlemen could enter into a stipulation that these rates are compensatory and that the same thing was done by this witness in connection with other rate studies? Wouldn't that save a lot of time?

I think I asked Mr. Wright that this morning. Now, we have got a part of this testimony in. But I am trying to shorten it if I can. If I can't, all right.

MR. WRIGHT: Well, our position is that the compensatoriness of the rates is not in issue. But we do not concede that, if it were, this kind of data would establish the compensatory nature.

11,991 THE COURT: You have a right to cross examine.

MR. WRIGHT: Surely.

THE COURT: All right, then.

(The jury resumed its place in the courtroom and the trial was resumed.)

DIRECT EXAMINATION (continued)

BY MR. WHEELER:

Q. Mr. Wright, I believe that just before the luncheon recess you had stated that you had prepared another exhibit similar to exhibit 31 which you obtained from the Interstate Commerce Commission publication, but which reflected the increased cost of handling explosives as testified to by Mr. Birk and Mr. Mahoney.

I hand you what has been marked by the Clerk as C & O Exhibit 32 and ask you whether or not that is the exhibit to which you referred?

A. That is correct.

MR. WHEELER: Your Honor, I offer in evidence exhibit 32.

THE COURT: It will be received over objection.

(C & O Exhibit 32 is received in evidence.)

11,992 BY MR. WHEELER:

Q. Please read the caption on this exhibit.

A. This exhibit 32 reads: "Revenue Contribution to Burden and Other Data for Explosives and Ammunition by Territorial Movements, 1956."

THE COURT: You wish to distribute that to the jury?

MR. WHEELER: Yes, sir.

(Copies of exhibit 32 were handed to the jurors at this point.)

BY MR. WHEELER:

Q. Now, would you state, Mr. Wright, in what way exhibit 32 differs from exhibit 31?

A. Mr. Wheeler, exhibit 32 is a recalculation of Exhibit 31, using the unit cost figures which I developed in my previous exhibit 30.

Q. Now, that is the exhibit that had the footnotes, right?

A. That is the exhibit that had the footnotes, and in which I developed the unit costs applicable to explosives traffic.

Now, exhibit 32 is exactly the same as exhibit 31, as far as column 1 to 6-- 1 to 7 -- are concerned. It is only beginning with column 8 that Exhibit 32 differs from Exhibit 31.

11,993 Column 8 represents out-of-pocket costs calculated in accordance with the unit-cost figures that I developed applicable to explosives, in exactly

the same manner as the Interstate Commerce Commission developed the out-of-pocket costs on exhibit 31.

The effect of this is to re-state the Interstate Commerce Commission's figure so as to include the additional cost of explosives.

Column 9, then, is -- as on the previous exhibit -- the deduction of the out-of-pocket cost from the revenue providing contribution which, on the first line, shows $212,715.

Again, column 10 is computed in exactly the same manner as the Interstate Commerce Commission computed the comparable column on exhibit No. 31.

The ratio of revenue to out-of-pocket cost is shown there on the first line as 2.60. In other words, for each dollar of expense, including the additional expense incurred because of explosives traffic, the railroads received $2.60 in revenues.

Likewise column 11 shows the ratio of revenue to fully distributed cost, the first line showing 199, which means that after allowance for all of the additional cost of handling explosives, the railroads received $1.99 in revenues for each dollar of expense incurred.

Q. Mr. Wright, have you been able to break down the item of explosives as between explosives shipped by the Government and explosives shipped by regular commercial manufacturers?

11,994 A. Fortunately, the waybill sample of the Interstate Commerce Commission, upon which this exhibit was based, had a separate symbol for government shipments -- rather, shipments moving under Section 22 quotations.

I was able to obtain the IBM cards, underlying this exhibit. I separated these so as to reflect only the Section 22 quotation, that is, the carloads moving under Section 22 quotations, and I have prepared an additional exhibit to show that picture.

DEPUTY CLERK: Defendant No. 15, Chesapeake & Ohio Exhibit No. 33 for identification.

(Defendant No. 15 C & O Exhibit No. 33 "Revenue Contribution to Burden and Other Data, Explosives in 1 per cent Waybill Sample for 1956, Section 22 Quotations" is marked for identification.)

BY MR. WHEELER:

Q. I hand you what has been marked for identification as C & O exhibit 33, Mr. Wright, and ask you if that is the exhibit to which you refer?

A. It is.

Q. Will you please read the title on that exhibit.

A. The title reads: "Revenue Contribution to Burden and Other Data, Explosives in one Per Cent Waybill Sample for Year 1956, Section 22 Quotations."

11,995 MR. WHEELER: Your Honor, I offer this exhibit in evidence.

THE COURT: It may be admitted over objection.

(C & O Exhibit No. 33 is received in evidence.)

BY MR. WHEELER:

Q. Was this exhibit No. 33 prepared in the same manner as exhibit 32, Mr. Wright?

A. Yes, this was prepared in exactly the same manner as exhibit 32. The difference being, of course, that a smaller number of carloads on those carloads moving under Section 22 quotations were used.

Q. What does this exhibit reflect in comparison to exhibit 32?

A. I will call your attention to column 10 of exhibit No. 33. There, on the first line, you will note that the ratio of revenue to out-of-pocket costs is 2.86.

Now, referring to the same column, column 10 on exhibit 32, the first line reads 2.60.

Q. So that the excess of revenue over out-of-pocket expense was greater in the case of explosives shipped by the Government than in the case of all explosives?

A. Yes, the ratio for shipment of explosives under Section 22 quotations on exhibit 33 is shown on here as 2.86. In other words, for each dollar of expense incurred by the railroads in shipping explosives under Section 22 Quotation, they received $2.86 in revenues, whereas, on explosives in general, for each dollar of expense incurred, the railroads received $2.60 in revenue.

11,996 Q. Is the same relatively higher return true with respect to the ratio of revenue to fully-distributed costs?

A. On the fully-distributed costs, the Section 22 quotations provided $2.12 in revenues for each dollar of expense, as over and against $1.99 in revenues for each dollar of fully-distributed cost on explosives traffic in general.

Q. Have you prepared any further exhibits reflecting the costs that are experienced by railroads in the handling of explosives?

A. I have prepared an exhibit showing the cost of handling explosives for various mileages.

THE COURT: All right.

DEPUTY CLERK: No. 15 Defendant, C & O Exhibit 34 for identification.

(Defendant No. 15, C & O Exhibit No. 34, captioned "Calculation of Cost per Hundredweight of Handling Explosives in 1956, Loaded 40,000 Pounds in box cars as per ICC Cost-finding Section Statement 2-58, Table 4, Average Weight trains, Adjusted to Reflect Additional Cost Incurred by Explosives Traffic" is marked for identification.)

11,997 BY MR. WHEELER:

Q. Mr. Wright, I hand you what has been marked for identification as C & O Exhibit 34 and ask you whether that is the exhibit to which you refer?

A. This is the one.

Q. Please read the caption on that exhibit.

A. The caption reads "Calculation of Cost per Hundredweight of Handling Explosives in 1956, Loaded 40,000 pounds, in Box Cars, as Per ICC Cost-finding Section Statement 2-58 Table 4, Average Weight Trains Adjusted to Reflect Additional Cost Incurred by Explosives Traffic."

Q. How many sheets are there to this exhibit?

A. Three sheets.

Q. Tell me what the second and third sheets are.

A. The first sheet covers Eastern District: The second, Southern Region; and the third sheet the Western District.

MR. WHEELER: Your Honor, I offer in evidence C & O Exhibit 34.

THE COURT: It may be received over objection.

11,998 (C & O Exhibit No. 34 is received in evidence.)

BY MR. WHEELER:

Q. Starting with the first column on the lefthand side of the first sheet --

A. The first column is marked "Docket 28,300 Miles."

This is purely the short-range mileage ranging from 50 miles to 1,800 miles.

THE COURT: Excuse me, Mr. Wright. What is Docket 28,300?

I think it has been explained before but would you mind telling us what that refers to? What does it mean?

THE WITNESS: Well, in a previous investigation, rate investigation of the ICC, which was given the docket No. 28,300, certain mileage scales were set up on the various classes of traffic and the mileages that I have used here are the short-line miles, in accordance with that docket.

THE COURT: All right. Thank you.

BY MR. WHEELER:

Q. These are short-mileages arranged by the Interstate Commerce Commission, is that right?

A. That is right.

11,999 Q. If you will proceed with Column 2, Mr. Wright.

A. Across the sheet?

Q. Yes.

A. The next column is the short-line mileages raised per circuity.

Q. What do you mean --

A. By that I mean that although the short-line mileage may be used, it is quite possible that a shipment may take a more circuitous route, a more round-about route.

The Interstate Commerce Commission has made extensive studies from time to time as to what is the average circuity for various types of traffic. For explosives they found out that it was about 14 per cent on an average. Now, that means that some of the traffic went by the Shortline route. Some of it went by a more circuitous route. But, when we come to a composite, an average of all of the traffic, there was about 14 per cent circuity.

Also, the length of haul affects circuity. The circuity allowed here is in accordance with that found by the ICC which averages around 14 per cent

for the explosives traffic, although it varies a little bit above or below 14 per cent in certain instances.

Now, the third column is headed: "Out-of-pocket Line-Haul Costs of .08960 per hundredweight mile."

12,000 Now, the first thing is to explain where that .09860 came from. If you will note Footnote "A" at the bottom of the sheet, you will see that I have adjusted Scale Cost of 31.50019 cents, which is divided by 400, hundredweight, and gives me .07875 cents.

Now, if you will refer to my previous exhibit No. 30, the one here in which I developed the unit costs, you will find in column 1, line 9, the 31.50019 cents. That is per car-mile.

As that is per car mile and as I am making my calculation in hundredweights, I must divide the car-mile cost by the number of hundredweights in that, and 40,000 pounds represents 400, hundredweight, so I divide my 31.50019 by 400 hundredweight, and obtained a figure of .07875 cents.

Now, again referring to my exhibit 30, you will find in column 2, line 9, the figure of .01085 cents which is the additional cost per hundredweight mile. So, I add those two figures together, and I come to the.08960 cents.

I may say here that if you would bear in mind the blackboard presentation that I have made, you can see here the fixed cost per car-mile of 31.50019, plus the additional cost per hundredweight in that car.

12,001 Now, taking this hundredweight mile cost of .08960, and multiplying by the actual miles, that is the short-line miles raised for circuity as shown in column 2, we get the array of figures shown in column 3. This represents the out-of-pocket, line-haul cost, of handling explosives forty-thousand pounds per box car.

Column 4 is headed "Out-of-pocket Terminal Cost of 32.13253 cents per hundredweight." Again referring to my demonstration this morning, the terminal cost is exactly the same regardless of the number of miles the car moved. Accordingly, this terminal cost remains the same for all mileages.

This 32.13253 cents was determined as shown in Footnote "D" at the bottom of the page. Here again, taking my exhibit 30, column 3, line 9, you will find the terminal cost per carload was 12,038.832 cents. This appears in this footnote, and it is divided by 400 hundredweight, making a terminal cost per hundredweight of 30.09708 cents.

To this I have added the terminal cost per hundredweight as shown in column 4, line 9, of my exhibit 30. Adding these two figures together we come to a terminal cost per hundredweight of 32.13253 cents.

Going back to the main portion of my exhibit now, I have added together the line-haul cost appearing in Column 4, which makes the total out-of-pocket cost, including loss and damage shown in column 5. That is, column 5 is merely the addition of columns 3 and 4.

12,002 Now, again referring to exhibit 30, you will see on line 9, column 5, that the constant line-haul cost is .01769 cents per hundredweight-mile. This factor, multiplied by the number of miles, shown in column 2, gives me the constant line-haul cost for the mileages indicated.

You will also see in my exhibit 30, column 6, line 9, that there was a constant terminal cost per hundredweight of 2.990 cents. This appears in column 7. Then, by adding the out-of-pocket cost in column 5, to the constant line-haul cost in column 6, the constant terminal cost in column 7, I obtained the fully-distributed cost per hundredweight shown in column 8.

Q. Now, do sheets 2 and 3 contain the same computation based on exhibit 30 that you have explained for the other two districts, that is, the Southern Region and the Western District?

A. Sheets 2 and 3 cover the Southern District and Western District respectively, the same procedure was used. It is merely that I have used the factors as developed for those districts in lieu of the Eastern District unit cost factors.

12,003 Q. Now, each line, as you go down the sheet, as I take it, represents the fully-distributed cost for 40,000 pounds for the mileage indicated, varying from 50 miles to 1800 miles?

A. Yes, that is right.

Q. Now, have you prepared comparable exhibits for cars carrying 60 and 80 thousand pounds, Mr. Wright?

A. Yes, sir. I made the same calculations, using 60,000 pound load and 80,000 pound load.

DEPUTY CLERK: No. 15 Defendant C & O Exhibit 35 for identification.

(No. 15 Defendant C & O Exhibit No. 35, titled, "Calculation of Cost per Hundredweight of Handling Explosives in 1956, Loaded 60,000 Pounds in Box cars as per ICC Cost-Finding Section Statement 2-58, Table 4, Average Weight Trains, Adjusted to Reflect Additional Cost Incurred by Explosives Traffic" is marked for identification.)

BY MR. WHEELER:

Q. Mr. Wright, I hand you what has been marked for identification as C & O Exhibit No. 35 and ask you to state what that purports to be.

A. This is the exhibit -- the title is "Calculation of Cost Per Hundredweight of Handling Explosives in 1956, loaded 60,000 pounds in box cars as per ICC Cost-Finding Section Statement 2-58, Table 4, average Weight Trains, Adjusted to Reflect Additional Cost Incurred by Explosives Traffic."

12,004 MR. WHEELER: Your Honor, I offer in evidence C & O Exhibit 35.

THE COURT: All right. It will be received over objection.

(C & O Exhibit No. 35 is received in evidence.)

(Copies of Exhibit 35 were distributed by Mr. Wheeler among the jurors.)

BY MR. WHEELER:

Q. Now, Mr. Wright, you stated you had prepared a comparable exhibit for 80,000 pound shipments?

A. I have also prepared an exhibit covering 80,000 pound loads.

DEPUTY CLERK: No. 15 Defendant, the C & O Exhibit 36 for identification.

(No. 15 Defendant C & O Exhibit No. 36, titled "Calculation of Cost per hundredweight of handling Explosives in 1956, Loaded 80,000 pounds in Box Cars as per ICC Cost-Finding Section Statement 2-58, Table 4, Average Weight Trains, Adjusted to Reflect Additional Cost Incurred by Explosives Traffic" is marked for identification.)

BY MR. WHEELER:

Q. I show you what has been marked for identification C & O Exhibit 36 and ask you to state whether that is the exhibit to which you refer?

12,005 A. Yes, sir. It is entitled: "Calculation of Cost per Hundredweight of Handling Explosives in 1956, loaded 80,000 Pounds, in box cars, as per ICC Cost-Finding Section Statement 2-58, Table 4, Average Weight Trains, Adjusted to Reflect Additional Cost Incurred by Explosives Traffic."

MR. WHEELER: Your Honor, I offer in evidence C & O Exhibit 36.

THE COURT: It may be received.

(C & O Exhibit No. 36
is received in evidence.)

(C & O Exhibit No. 36 is shown to the jury.)

MR. SHEA: Could the clerk inform me if No. 35 is in evidence.

Is Exhibit 35 admitted?

DEPUTY CLERK: I did not think it was, Mr. Shea, but Mr. Wheeler said it was.

THE COURT: You offered 35 in evidence.

MR. WHEELER: Yes, sir.

THE COURT: I thought it was received.

12,006 BY MR. WHEELER:

Q. Mr. Wright, were exhibits 35 and 36 prepared in the same manner as exhibit 34?

A. They were.

Q. They reflect the same information but for the larger shipments? That is, the larger loading in each car, is that correct?

A. Yes, the larger loading was used on each of these statements, and, of course, for each of the different districts I used the proper unit cost for that district.

Q. Mr. Wright, have you prepared any other exhibits showing the comparison between the reduced rates on explosives in 1955 and 1956 with railroad cost of handling explosives in that year?

A. Yes, sir. The exhibits which I have just presented --

MR. WRIGHT: Excuse me. I thought I understood Mr. Wheeler to say "comparing reduced rates in 1955" --

THE COURT: Did you say 1955?

MR. WHEELER: I should have said in 1956.

* * *

DEPUTY CLERK: No. 15 Defendant C & O Exhibit 37 marked for identification.

12,007

(No. 15 Defendant C & O Exhibit No. 37 titled "Explosives, Rates and Costs, as of 1956, 40,000 pounds," was marked for identification.)

BY MR. WHEELER:

Q. Mr. Wright, I hand you what has been marked for identification as C & O Exhibit 37 and ask you to state what that purports to be.

A. This exhibit is entitled "Explosives, Rates and Costs, as of 1956, 40,000 pounds."

It consists of three sheets. The first sheet covers 40,000 pounds in Official Territory. The second sheet 40,000 pounds in Southern Region; the third sheet 40,000 pounds in Western District, East of the Rocky Mountains."

MR. WHEELER: I offer in evidence C & O Exhibit No. 37.

THE COURT: It may be received.

(C & O Exhibit No. 37 is received in evidence.)

(Copies of Exhibit No. 37 were distributed among the jurors by Mr. Wheeler.)

BY MR. WHEELER:

Q. Why did you limit the third sheet to the area east of the Rocky Mountains, Mr. Wright?

12,008 Why did you limit sheet 3 to the Western District east of the Rocky Mountains?

A. Well, the 28,300 docket was restricted to traffic moving east of the Rocky Mountains. Therefore, the rates on traffic to the west of the Rocky Mountains may or may not follow the 28,300 scale.

Q. Now, Mr. Wright, turning to exhibit 37, will you explain where the figures used on this exhibit were derived? Where did you obtain the figures from that were used in this exhibit?

A. This exhibit compares the rate, in the first grouping to the left, the rate per hundredweight with the out-of-pocket cost and the full cost per hundredweight.

The rate is a rate as calculated from the tariffs published under the Section 22 Quotations. The rate here is 45 per cent of First Class, with the first 40,000 pounds. The out-of-pocket cost is shown in column 3, and is merely the cost as determined in the previous exhibit covering development of out-of-pocket cost.

Exhibit 34 in column 5 provided an array of out-of-pocket costs. These are shown in column 3 of exhibit 37, Mr. Wheeler. Likewise, the full cost as determined in column 8 of exhibit 34 has been transferred to c olumn 4 of exhibit 37. The only exception being that I have dropped some of the fractions for simplification.

12,009 Q. You have rounded the fraction off to the nearest hundredth, to the nearest tenth?

A. Yes, to the nearest tenth of a cent. Then the three columns to the right I have raised these rates and costs to the carload basis. That is done by multiplying the rate or the cost by 400, that is the number of hundredweight loaded per car.

The column entitled "Revenue" under the Caption Section 22 rates in effect December 1, 1955, placed on a per car basis, is merely 400 times the amount shown in column 2: Likewise, column 6 is 400 times column 3, and column 7 is 400 times column 4.

Q. Are there any particular items in this exhibit that you wish to direct to the jury's attention?

A. Well, on the line for 50 miles, you will see that the revenue per car was $188, in column 5. The out-of-pocket cost was $149, providing a contribution above out-of-pocket cost of $39. Likewise, column 7, the $165, full cost is $23 less than the revenue.

In other words, there was at 50 miles, a contribution, or I might say, a profit of $25 above cost.

Now, if I take the greatest mileage, 1,800 miles, we find the same kind of picture. We find that the revenue is $1,044 per car, against an out-of-pocket cost of $851 and the whole cost is $1,006 or $38 less the $1,044 revenue.

12,010 Q. Have your prepared comparable exhibits for exhibits for 60,000 and 80,000 pound shipments?

A. Yes, I have.

DEPUTY CLERK: No. 15 Defendant, the C & O Exhibit 38 for identification.

(No. 15 Defendant C & O Exhibit No. 38, titled "Explosives, Rates and Costs, as of 1956, 60,000 pounds" was marked for identification.)

BY MR. WHEELER:

Q. Mr. Wright, I hand you what has been marked for identification as C & O Exhibit 38 and ask you to state whether that is the comparable exhibit to exhibit 37, but relating to 60,000 pound shipments?

A. Yes, it is.

MR. WHEELER: I offer in evidence C & O Exhibit No. 38.

THE COURT: It may be received.

(C & O Exhibit No. 38 is received in evidence.)
(Exhibit 38 was distributed to the jury by Mr. Wheeler.)

DEPUTY CLERK: No. C & O 39 for identification.

12,011

(No. 15 Defendant C & O Exhibit Number 39, titled "Explosives, Rates and Costs as of 1956, 80,000 pounds" was marked for identification.)

BY MR. WHEELER:

Q. Mr. Wright, I hand you what has been marked as C & O Exhibit 39 for identification and ask you if this is comparable in all respects to exhibits 37 and 38, except in so far as it relates to shipments of 80,000 pounds instead of 40,000 and 60,000 pounds?

A. That is correct.

MR. WHEELER: Your Honor, I offer in evidence Exhibit No. 39.

THE COURT: It may be admitted.

(No. 15 Defendant C & O Exhibit No. 39 is received in evidence and distributed to the jury.)

BY MR. WHEELER:

BY MR. WHEELER:

Q. Now, Mr. Wright, do you have any comments to make on these last three exhibits which you have prepared, that is 37, 38, and 39.

A. Did you ask me whether I prepared drafts?

Q. No, sir. I asked you if you had any comments?

A. Comments?

Q. With respect to exhibits 37, 38 and 39, if you have any comments?

A. I wish to point to, or call your attention to the fact that in each one of these exhibits the revenue has exceeded the full cost in each district and for all mileages involved.

12,012 Q. Mr. Wright, how does the revenue above full cost compare for 50 miles on each of the three exhibits?

A. How do they compare at 50 miles?

Q. Yes, sir. Referring now to Official Territory, sheet 1 of each of those exhibits.

A. Would you like that on a per-car basis?

Q. Yes, sir.

A. Taking Official Territory, at 50 miles the revenue per car is $188. An out-of-pocket cost of $129 and a full cost of $165. There is a spread then between the full cost and the revenue, indicating a profit of $23 per car at 50 miles: And 40,000 pound loads.

At, 60,000 pound load -- at 50 miles the revenue goes up to $264. The out-of-pocket cost goes up to $154, and the full cost to $178.

I would like to call your attention to the fact that whereas the revenues went up $76, the full cost went up by $13.

At 80,000 pounds, the revenue was $340 per car. The out-of-pocket cost is $159. And the full cost $191. In other words, the revenue at 80,000 pounds is $152 higher, whereas, the cost increased by about $26.

12,013 Q. Does this reflect one of the principles that you demonstrated on the blackboard at the outset of your testimony?

A. Yes, it is.

Q. Which one of the principles does this show?

A. This would be the principle of loading the car heavier.

Q. Now --

A. That is, the cost is distributed over a larger weight per car.

Q. Now, would the revenues above the profit, or revenue above full cost, increase as you increased the mileage on the mileages shown on these three exhibits?

A. Yes, the revenue per car has increased --

Q. I am talking about the revenues above full cost. Would they --

A. Well, yes, the contribution or profit above full cost increases as you increase the load per car.

Q. Supposing as you increased the mileage -- what happens?

A. If you increased the mileage, you would also have an increase in contribution.

Q. Can you demonstrate that from these exhibits?

A. Yes, I can demonstrate them. I think it can be done graphically better than it can be if we just looked at these figures.

12,014 Q. Have you prepared some charts to demonstrate this?

A. Yes, I have.

DEPUTY CLERK: No. 15 Defendant, C & O Exhibit No. 40 for identification.

(No. 15 Defendant C & O Exhibit No. 40, being a comparison of Revenue with Costs, Official Territory, 40,000 pound-load of explosives is marked for identification.)

BY MR. WHEELER:

Q. Mr. Wright, do you want all three of these charts at one time, then, for comparative purposes?

While we are marking these exhibits, would you go through exhibit -- referring to exhibits 37, 38 and 39 and the distance of 900 miles, would you compute the excess of revenue over full cost on each of those exhibits for Official Territory, and state them for the record, please?

A. Is there any magic of using the 900 miles? I have some penciled notes here as to the differences --

Q. I would like you to use 900 miles and then go to any others that you wish.

DEPUTY CLERK: No. 15 Defendant C & O Exhibit No. 41 for identification.

12,015

(No. 15 Defendant C & O Exhibit No. 41, being a comparison of Revenue with Costs, Official Territory, 60,000 pound-load of Explosives is marked for identification.)

DEPUTY CLERK: No. 15 Defendant, the C & O Exhibit No. 42 for identification.

(No. 15 Defendant C & O Exhibit No. 42, being a comparison of Revenue with Costs, Official Territory, 80,000 pound load of Explosives is marked for identification.)

BY MR. WHEELER:

Q. Mr. Wright, may we interrupt your computations long enough to have you identify these and then I will distribute them while you are finishing.

I hand you what has been marked for identification as Defendant's exhibit 40. Will you please state what that is.

A. This is a comparison of revenue with costs, Official Territory, 40,000 pound load of explosives.

MR. WHEELER: I offer in evidence C & O Exhibit 40.

THE COURT: Received.

(C & O Exhibit 40 is received in evidence.)

THE WITNESS: The next one is comparison of revenue with costs official territory, 60,000 pound explosives.

12,016 MR. WHEELER: Your Honor, I offer in evidence C & O Exhibit 41.

THE COURT: Admitted.

(C & O Exhibit 41 is received in evidence.)

THE WITNESS: The third one is comparison of revenue with cost, Official Territory, 80,000 pound load explosives.

THE COURT: Have you offered 42 yet?

MR. WHEELER: I wish to offer C & O 42 in evidence.

THE COURT: It may be admitted in evidence.

(C & O Exhibit 42 is received in evidence.)

(Exhibits 40, 41 and 42 were distributed to the jurors.)

MR. WHEELER: Your Honor, we have some large boards here which are the same charts, just blown up. I would like to have this one marked 40-A.

THE COURT: All right.

DEPUTY CLERK: No. 15 Defendant C & O Exhibit 40-A for identification.

(No. 15 Defendant C & O Exhibits Nos. 40-A being a numberof charts were marked for identification.)

12,017 MR. WHEELER: Your Honor, may I offer this in evidence.

THE COURT: Sure, it may be admitted.

(C & O Exhibit 40-A is received in evidence.)

MR. WHEELER: It will be 40-A, 41-A and 42-A which I wish to admit in evidence.

THE COURT: All right.

(C & O Exhibits 41-A and 42-A, some charts, were marked for identification and received in evidence.)

* * *

12,017 Q. Have you finished your computation?

A. Yes, sir, I have a calculation here.

Q. Will you please state what you computed and what the results were?

A. At 900 miles, the rate per hundredweight, at 80,000 pounds, is 151 cents; at 40,000 pounds it is 168. In other words, the average cost per hundredweight is 17 cents lower in loading the cars 80,000 pounds.

12,018 The out-of-pocket cost, at 80,000 pounds, is 68.6 cents per hundredweight: At 40,000 pounds it is 124, or the cost per hundredweight has been reduced by 55.5 cents per hundredweight. Essentially the same calculation or difference exists in regard to the full cost. The cost at 80,000 pounds is 89.8 cents per hundredweight, whereas at 40,000 pounds it is 145.2 cents per hundredweight, a difference of 55.4 cents. That is the loading of the car at 80,000 pounds instead of 40,000 pounds reduces the cost by 55.4 cents per hundredweight.

Q. Now, can you give us, by reference to the last column of exhibits 37, 38 and 39, can you give us the amounts in dollars for a car that your revenue exceeded full cost at 900 miles?

A. At 900 miles?

Q. Yes. By how much did the full cost exceed the revenue on a 40,000 pound shipment.

MR. McGLOTHLIN: Could I have that question read back?

THE COURT: Read the question back. Just a minute, please. Just a minute.

(The reporter read the pending question.)

BY MR. WHEELER:

Q. Mr. Wright, you realize that I mis-stated that, that I wanted to know by how much the revenue exceeded full cost at 900 miles on a 40,000 pound carload.

12,019 A. I believe the same calculation on a per-car basis. At 80,000 pounds, the revenue per car would be $1,208. At 40,000 pounds, it would be $672.

In other words, we have by loading the car 80,000 pounds, an additional $536 per car revenue.

Now, cost-wise, at 80,000 pounds, the cost if $549; whereas at 40,000 pounds it is $496. In other words, the out-of-pocket cost increased by about $53 and the railroad would receive $536 additional revenue because of the heavier loading per car.

Now, doing the same thing on a full cost basis, the revenues of course remain the same. The full cost at 80,000 pounds would be $718; at 40,000 pounds it would be $581. In other words, the cost would increase by $137, and the railroads would receive $536 additional revenue.

Q. Now, Mr. Wright, do you have before you exhibits 41 and 42 of Defendants?

A. Yes.

Q. Have you observed that we have put up charts 40-A, 41-A, and 42-A?

A. Yes.

Q. Now, do you wish to make any point with respect to these charts?

12,020 A. Yes.

Q. If you wish to use the large ones, may he step down from the stand, your Honor?

A. (At the blackboard) These charts, these three charts merely graphically portray the figures on the exhibits preceding that, 37, 38 and 39. Taking the 40,000 pound load, the revenue goes up in this pattern. The out-of-pocket cost goes up in this pattern, and the full cost goes up in this pattern (indicating.)

Now, at 60,000 pounds we have the revenues going up in this pattern. I would like you to note that the line ends here at about 250: Whereas, over here it is somewhat higher. It is a wee bit higher. The revenue has dropped just a little bit on this chart, below what it is on this chart. In other words, the shipper receives a reduction in his cost of transporting explosives by loading the cars 60,000 pounds, instead of 40,000 pounds.

Note further that, if he loads 80,000 pounds, this revenue line drops still further (referring to exhibit 42-A.)

This is a savings to the shipper. It is an incentive to get the shipper to load his cars more heavily.

Meanwhile, if we take this out-of-pocket cost line here, we see that on this chart it is slightly above 200 -- referring to 40-A. Here it is about 150 on 41-A. Here the drop is down to maybe 120 or so, referring to 42-A.

12,021 In other words, by granting the shipper a small reduction in his rate, coupled with the incentive to load the cars heavier, there is a greater spread between the revenue and the full cost. It keeps increasing as the cars are loaded more heavily.

The same is true in connection with full cost.

* * *

Q. Mr. Wright, would you resume your explanation of those charts? Did you have anything further to say with respect to them?

A. Yes. The second characteristic that I mentioned to you this morning about how the costs are reduced as the mileage increases is also illustrated here on these charts.

For example, if you take this revenue line at the 80,000 pound load basis, you will see here at about, oh, let me see, take 800 miles, we have a revenue here of, I would say, $1.45 per hundredweight.

12,022 We have here at that same mileage an out-of-pocket cost of perhaps 60 cents.

The spread between these two lines, at this point (indicating) is much greater than, say down here at 50 miles, or at 200 miles. That is, the general spreading of these lines, as the short-line mileage increases, should be noted.

That is true whether it is the 80,000 pounds, or 60,000 pounds, or on the basis of the 40,000 pound load.

Q. Mr. Wright, I would like you to refer once more, also, to illustrate these two points that you have made, to exhibits 37, 38 and 39.

(The witness resumed the witness chair at this point.)

BY MR. WHEELER:

Q. Now, referring to the distance, or using the distance of 900 miles, would you indicate the difference in the profit that a railroad makes on a 40,000 pound carload, a 60,000 pound carload, and an 80,000 pound carload.

A. At 40,000 pounds, the revenue amounts to $672. The full cost $581, or a spread or a profit of $91 per car.

12,023 At 60,000 pounds, the revenues of $940 incur a full cost of $649 or create a profit of $291. That is, $200 more than would be earned at 40,000 pounds per car.

Taking now 80,000 pounds per car, we find the revenues of $1,208 would incur full costs of $718, creating a profit of $490, or approximately $400 per car more than a load of 40,000 pounds.

Q. Now, Mr. Wright, do you have any other evidence to present to the court and the jury to indicate that the rates in effect in 1956, to the Army and the Navy and Air Force, were compensatory?

A. Yes.

Q. What is it?

A. The ICC refused to suspend the same rate scale for commercial traffic in 1957.

MR. WRIGHT: The Court please, that question assumes, as does the answer, a fact which cannot be supported by competent evidence, and that is the suggestion that the Interstate Commerc Commission, in refusing to suspend that or any other rate, made any findings whatsoever or gave any consideration of any kind to the rates that are in issue here. It is quite a misleading question and answer. It should be stricken.

THE COURT: Do you make that in the form of an objection?

12,024 MR. WRIGHT: Yes, I do. I move to strike the answer.

THE COURT: I sustain that. I do not think there is a proper foundation for that.

MR. WHEELER: May I proceed to question this witness and lay the foundation for it?

THE COURT: Let us see what happens.

BY MR. WHEELER:

Q. Did you state that the rate scale in the tariff, in the 1957 tariff was the same as that which was made applicable to the Army, the Navy and the Air Force, in 1955 and 1956?

MR. WRIGHT: I think we ought to have identified the particular tariff he is talking about, and I think as soon as that is done it will appear on the face of the tariff that it has absolutely no relation to any of these section 22 rates here.

THE COURT: Let us find out what the tariff was.

MR. WHEELER: I first of all want to say, I am sure Mr. Wright's own witness, as I recall, Mr. Hummer stated -- and Mr. Riss, also -- stated that the army and the navy have available to them any published tariff, any tariff that is published with the ICC, as well as the Section 22 rates, The Section 22 rates by definition, are rates that are put in, special rates that are put into them which may be below the published tariff rates.

12,025 THE COURT: Well, he is talking about the tariff, right?

MR. WRIGHT: I gather that what he means to go into now is the published rates, the rates published with the ICC, which were published for the purpose of moving primarily commercial ammunition and explosives. I do not believe that those rates are at all relevant to what we are considering here.

THE COURT: Well, let us find out what the tariff is.

Can we come back to that later?

MR. WHEELER: No, this is the final group of questions to this witness.

While Mr. Olson is looking for the tariff, itself, I did not understand Mr. Wright's last statement. Is it his position that tariffs filed with the ICC are not available, tariff rates published with the ICC are not available to the military, to the Government?

THE COURT: Is that your position?

MR. WRIGHT: Of course not. They, like any other rates, are available in the sense that the government may always use the lowest rate with a section 22.

My point was that whatever may have been published by the railroads, in the form of commercial tariffs, for the benefit of commercial shippers generally, in this 1957 period, has absolutely nothing to do with the question of whether or not these section 22 quotations which were made in 1955 and 1956 that are in issue here, were reasonable, unreasonable, compensatory or anything else.

12,026 THE COURT: I think I understand the point.

What do you say to that, Mr. Wheeler?

MR. WHEELER: Simply this, Your Honor.

If the ICC did, in fact, in 1957, refuse to suspend a tariff which was the same as the tariff that was in effect, that was put into effect for the military, certainly, I think that is evidence with respect to the compensatory character of the rates. I intend to develop what conclusion this witness, as an expert, draws from the Commission's failure to refuse rates that were protested.

Now, you may recall, your Honor, that Mr. Hummer, Mr. Wright's rate expert, stated on this stand that the failure of the ICC to refuse rates, once they had been protested, indicated the Commission's failure to find that the rates were not compensatory.

THE COURT: Let me ask you this: Wouldn't you have to bring somebody over from the Commission and subject the part to cross examination, stating the reasons that they gave for refusal to suspend?

MR. WHEELER: I believe this man is an expert in this field. In fact, I know he is. I propose to ask him his conclusion, what conclusion he

draws from the fact that the ICC refused to suspend rates that were put into effect by the railroads, identical with those that they published for the Army and Navy as Section 22 quotations, after the Motor Carriers protested it.

12,027 THE COURT: Wouldn't there be a decision on that with the ICC, giving the reasons why they did not suspend it?

MR. WHEELER: No, there is not. They merely issued a letter saying "We don't suspend".

THE COURT: Wouldn't he more or less have to be reading their minds for the reasons they gave for not suspending?

MR. WHEELER: No, sir, No more than Mr. Hummer did.

THE COURT: I do not recall Mr. Hummer's testimony on that point.

MR. WRIGHT: May I say, if Mr. Wheeler were proceeding by way of evidence instead of argument, the minute the ICC order, refusing to suspend, went in, it would show on its face that the ICC expressly says, "This is not a determination as to the reasonableness of the rate. The suspension of the decision was not made. There was no hearing. There was no record made.

12,028 As I say, if he were undertaking to offer the underlying evidence instead of the witness' conclusion, it would be quite apparent that the witness would never be able to state the conclusion that he has said he is going to offer.

THE COURT: I understand your position.

MR. WHEELER: Let me read you from Mr. Hummer, what Mr. Wright's witness said on this subject.

MR. WRIGHT: I object to that. Let him go ahead with his evidence and not this.

THE COURT: I do not want to go all over Mr. Hummer's testimony again. The jury undoubtedly recalls it. I have forgotten the point. Do you object to that part of it, Mr. Wright? I do not think a proper foundation has been laid.

MR. WRIGHT: There is no foundation whatsoever.

THE COURT: I will sustain the objection. Is that the last question?

MR. McGLOTHLIN: Do I understand the ruling is that it is irrelevant, that the ICC refused to suspend?

THE COURT: I do not think the proper foundation has been laid so that this witness can testify as to the reason given by the Commission. If you can produce the letter, that might be one thing, or the ruling.

MR. WHEELER: As I stated before, the Commission does not issue an opinion.

12,029 THE COURT: What was the reason for the Commission suspension --

MR. WHEELER: I intend to get that from this witness.

THE COURT: Has he talked with anyone over there?

MR. WHEELER: I am sure he has on numerous occasions. This man is a rate expert, just as much -- and is as familiar with those things -- as Mr. Hummer was. Mr. Hummer was permitted to testify with respect to this issue. I see no reason why Mr. Wright should not be permitted to testify.

THE COURT: You say he was permitted to testify. I will not agree with you, because I do not recall that part of the testimony. I will leave that to the jury.

MR. SHEA: If the Court please.

THE COURT: Let the jury step outside. We will have no more argument in the presence of the jury. There has been enough of that already.

(The jury left the room at 3 p.m. and the following occurred out of their hearing and presence.)

THE COURT: All right. Proceed.

MR. SHEA: If the Court please, as I understood, Mr. Wheeler was about to refresh your recollection as to precisely what Mr. Hummer testified to, and I take it that if you allowed the testimony of Mr. Hummer to be put in, which was comparable, that this should be persuasive to your Honor as to the admissibility on this occasion.

12,030 THE COURT: One at a time now. What do you contend Mr. Hummer stated on this?

MR. WHEELER: I have his specific statement right here, your Honor.

THE COURT: You have his statement?

MR. WHEELER: Yes, sir.

THE COURT: What did he say?

MR. WHEELER: Mr. Hummer -- I was cross-examining him. This is at pages 6501 to 6503.

"MR. Hummer: When a tariff is filed containing a schedule of rates with the Commission, do the competing carriers have an opportunity to protest?

"A. Yes.

"Q. And when they protest the rate, if it is a rate reduction, then the Board of Suspension of the Interstate Commerce Commission determines whether to suspend or not, doesn't it?

"A. That is right.

12,031 "Q. And if it determines not to suspend, doesn't that indicate that the Board of Suspension believes the rate to be compensatory, Mr. Hummer?

"A. The Board, the Suspension Board, I would say, feels that, you might say, it isn't too bad. If the Protestants still feel it is not the proper rate, they have an opportunity to file a formal complaint. The Commission will always say that this suspension does not mean that the Commission means the rate is reasonable. I understand they will never say a rate is reasonable except after a formal case.

"Q. I understand that. I am not talking in terms of reasonableness.

"A. Well, I mean lawful, anyway.

"Q. Isn't the first thing the Board of Suspension looks at to determine whether or not the proposed rate reduction or reduced rate is compensatory?

"A. That is one of the things they do. They call in the cost section and ask them about it.

"Q. And if they don't suspend, the Board of Suspension doesn't suspend, that indicates that in their judgment the rate is compensatory, does it not?

12,032 "A. As I said before, it indicates in their judgment that it is not so far wrong that it should be suspended. Let the rate go into effect, and if there is still a disagreement about it, somebody can file a formal complaint. They do not make the statement that the rate is compensatory in their view. I understand that.

"Q. I understand that.

"A. They won't give a reason for not suspending. For suspending they do give a reason as provided by law.

"Q. Isn't it ordinarily argued, though, to the Commission, itself, that when the Board of Suspension fails to suspend a rate, that is tantamount to acceptance by them of the compensatoriness of that rate?

"A. No.

"THE COURT: I didn't get your answer. What was your answer?

"THE WITNESS: No.

"THE COURT: All right.

"Anything further, Mr. Wheeler?

"MR. WHEELER: Only one more question.

12,033 "Q. Mr. Hummer, if the Board of Suspension regards the rate as clearly not compensatory, they have an obligation to suspend, do they not?

"A. Yes, sir.

"MR. WHEELER: I have no further questions."

Now, Your Honor, I propose to ask this witness questions identically similar to those that I asked Mr. Hummer, and ask what conclusion he draws from the fact that the Commission in 1957 refused to suspend rates that were identical with those which the railroads put into effect in 1955 and 1956, as sectibn 22 quotations, for the government.

THE COURT: All right. Let us find out.

MR. WRIGHT: Mr. Wheeler has a curious idea of what makes competent testimony, because he asked improper questions on cross examination over objection, so now he thinks that gives him the right to ask similar improper questions of his own witness in presenting his case.

MR. WHEELER: There were no objections to my questions at all.

MR. WRIGHT: The fact is that in this particular rate that he is asking the witness to talk about, when the Commission refused to suspend, it notified the parties in these terms and this language.

12,034 THE COURT: What are you reading from now?

MR. WRIGHT: I am reading from the letter of the Secretary of the Commission to the parties to the Protest. Dated October 7, 1957.

THE COURT: The same protest that Mr. Wheeler has been talking about.

MR. WRIGHT: That is what I believe he proposes to have the witness talk about. He has not gone to the trouble of laying the foundation of identifying the quotation or the protest.

But as nearly as I can find out this is what he is talking about.

THE COURT: Read it.

MR. WRIGHT: This says:

"Reference is made to your recent request for suspension of certain provisions in the following schedules: Item 1545, Supplement No. 13, Tariff E2009(B) ICC No. 47722 F.H.R. Agent, Published to become effective October 10, 1957.

"The Commission, upon consideration of the matters involved has concluded not to suspend the operation of the foregoing schedules. This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's rules of practice.

12,035 "Respectfully,

Secretary."

THE COURT: Doesn't that say that this action does not constitute approval?

MR. WRIGHT: It is perfectly clear that it does not.

MR. WHEELER: I do not anticipate this witness will say the Commission approved the rate, either. I do know that this witness will testify that when the Commission refuses to suspend, that is tantamount to a finding that the rate is compensatory, at that level.

I also intend to ask this witness whether, having searched the files of the ICC with respect to this issue, whether any formal complaint was filed by any motor carrier following the refusal of the Commission to suspend.

I know this witness will testify that no motor carrier filed such a complaint.

MR. SHEA: Your Honor.

THE COURT: All right.

MR. SHEA: Your Honor, it is my view -- I gather, the view of everyone on this side of the table -- that this is the kind of a question you should have been advised by the ICC, for those purposes. Now, I take it we are faced with the problem of proving to your Honor the significance of action in the ICC.

12,036 Now, I know of no other way of proving the significance of that action, or at least let me put it this way, in the reverse -- it seems to me it is clearly appropriate to prove the significance of the action of the ICC.

THE COURT: Now, I am going to let the witness testify. You may cross examine him on this paper.

MR. WRIGHT: I do not think there is any foundation for his testimony, your Honor at all. He is apparently going to testify to something that will not even be in evidence here, either the quotation or the protest --

THE COURT: Well, I think you ought to show him the statement that Mr. Wright just read, and have him be familiar with that before he testifies.

MR. WHEELER: He is familiar with it, your Honor.

MR. WRIGHT: I think he certainly has to lay a foundation showing what rate it is, when this was filed, and who filed it. It will appear -- as soon as that appears, it will also become apparent that Riss & Company had absolutely nothing to do with this.

THE COURT: I think Mr. Wright, that --

12,037 MR. WRIGHT: Now, your Honor --

THE COURT: Just a minute. Mr. Wheeler, if you will go into detail on this, as Mr. Wright indicated, I think it will be clear to the jury. I do not think you should ask him the question without putting in some facts as to what this protest was about, who made it and so forth. Then we will see what he says.

12,038 (Thereupon the jury entered the courtroom and resumed their seats in the jury box.)

THE COURT: All right, Mr. Wheeler.

BY MR. WHEELER:

Q. Mr. Wright, are you familiar with the fact that the railroads filed a tariff in 1957 with the Interstate Commerce Commission which had the same for general application to anyone, commercial or government, a government shipper, that was the same scale that the rails put into effect as a Section 22 quotation in 1955 and 1956?

THE COURT: Just a minute, please.

MR. WRIGHT: The question is objectionable as calling for a whole series of conclusions. If there was a tariff put into effect, he can identify it and offer it in evidence.

THE COURT: Let's find out about it.

Do you have a tariff that was put into effect?

MR. WHEELER: Yes, sir.

THE COURT: Suppose you show it to the witness.

First identify it and put it into evidence.

THE CLERK: No. 15 Defendant, C & O's Exhibit No. 43 for identification.

(Thereupon freight tariff, Supplement 13 to freight Tariff 3-2009-B issued August 27, 1957, effective 10-10-57 was marked Defendant 15 (C & O) Exhibit No. 43 for identification.)

12,039 Q. Mr. Wright, I hand you what has been marked for identification as C & O Exhibit No. 43 and ask you to state what that purports to be.

A. This is a freight tariff filed by Trunk Lines Central Territory Railroads Tariff Bureau, Supplement 13 to Freight Tariff E-2009-B, issued August 27, 1957, effective October 10, 1957.

Q. Are the points to which it is applicable indicated as those within Official Territory?

A. Yes.

Q. Does that tariff show rates on explosives?

A. Yes. On the second page of this exhibit it shows that rates were published on shipments weighing in excess of 40,000 pounds in the car, on the first 40,000 pounds, 45; on weight in excess of 40,000 pounds, 36.

Q. Now, Mr. Wright, are those the same percentages of first class rate which the railroads published and which have been the subject of the study that you have introduced here today?

A. Yes.

THE COURT: All right.

BY MR. WHEELER:

Q. Mr. Wright, did you make an investigation at the Interstate Commerce Commission to determine whether or not there were protests filed to this tariff?

12,040 A. There were no protests filed.

Q. There were no protests filed to this tariff?

A. Well, there were no protests filed to the suspension. There were protests to the tariff, yes.

Q. There were protests filed to the tariff, were there not?

A. What is that?

Q. There were protests filed to the tariff?

A. No -- yes. There were no protests -- there were protests filed to this tariff.

Q. Once there were protests filed, what did the protests request, or who filed the protests?

A. Various motor carriers. There was one by Whitton; Zimmerman, I remember; Hoover, I think.

Q. Did they request -- did those protests request that the tariffs be suspended?

A. Yes, they requested that the tariffs be suspended.

* * *

12,047 Q. Mr. Wright, did the Commission suspend following the protest -- following the protest of the motor carriers, did the Commission suspend the tariff?

A. It did not.

Q. Subsequent to the Commission's refusal to suspend, did any motor carrier file a complaint with the Interstate Commerce Commission asking for a hearing?

A. No.

Q. Mr. Wright, what conclusion do you draw from the Commission's refusal to suspend after a protest was filed?

MR. WRIGHT: If the Court please, I don't think this witness is competent to draw conclusions for this jury as to the significance of the suspension, particularly when we haven't yet had an offer of what the Commission itself said when it refused to suspend. That is in writing. That was communicated in writing by the Commission to all the parties to the proceeding.

THE COURT: Do you have that, Mr. Wheeler?

MR. WHEELER: Yes, sir.

THE COURT: Let's get the whole picture before this jury then.

12,048 I have been trying to tell you gentlemen that for days. Now, let's get it all before the jury -- both sides.

MR. WHEELER: Mark it, please.

THE CLERK: No. 15 Defendant Chesapeake & Ohio's Exhibit No. 44 for identification.

(Thereupon a document, copy of ICC notice of suspension was marked Defendant No. 15 (C&O) Exhibit No. 44 for identification.)

BY MR. WHEELER:

Q. Is this a copy of the notice of suspension?

I hand you, Mr. Wright, a document that has been marked for identification as C & O Exhibit No. 44. Is that the Commission's action on the request of the motor carriers to suspend the tariff to which you previously referred?

A. It is.

MR. WHEELER: Your Honor, I offer this is evidence.

THE COURT: All right, it will be received.

Has Mr. Wright seen it?

(Document shown to Mr. Wright.)

THE COURT: All right.

(Thereupon copy of ICC notice of suspension marked for identification Defendant No. 15 (C&O) Exhibit No. 44 was received in evidence.)

* * *

12,049 MR. WHEELER: Do you want to read it, Mr. Wright?

THE WITNESS: This is on the letterhead of the Interstate Commerce Commission, Office of the Secretary, Washington 25, D. C.

Susp - 13072
RGS:HA
October 7, 1957

"Mr. H. K. Zimmerman, GM, T.M. Zimmerman Co., 227 West Commerce St., Chambersburg, Pa.

12,050 "L. D. Lawrence, Jr., ATM, Hoover Motor Express Co. Inc., Nashville, Tenn.;

"Mr. Charles O. Gillogly, VP, G. I. Whitten Transfer Co., Suite 209 LaSalle Bldg., 1028 Connecticut Avenue, Washington 6, D. C.;

"Mr. John R. Quillman, Central States Motor Freight Bureau, Inc., 316 East Ohio St., Chicago, Illinois:

"Gentlemen:

"Reference is made to your recent request for suspension of certain provisions in the following schedules:

"Item 1545, Supplement No. 13 to Tariff E-2009-B, I.C.C. No. 4772 of H. R. Hinsch, Agent "published to become effective October 10, 1957.

"The Commission, by its Board of Suspension, upon consideration of the matters involved, has concluded not to suspend the operation of the foregoing schedules.

"This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice.

"Respectfully,

"Secretary.

12,051 "cc: H. R. Hinsch, Agent.

"Trunk Line - Central Territory Railroads Tariff Bureau, 22 West Madison St., Chicago 2, Ill."

* * *

12,061 Q. Mr. Wright, what conclusion do you draw from the Interstate Commerce Commission's refusal to suspend the column 45 and column 36 rates filed with the Commission by the railroads in 1957, after the motor carriers insisted that the Commission suspend those rates?

* * *

THE WITNESS: The Interstate Commerce Commission has an obligation to suspend any tariff which they believe is not compensatory, if it is unlawful, if it creates destructive competition. If any of these events occur, or if it is in any way illegal, the Commission must suspend.

Now, the motor carriers have a right to protest, and in protesting there will be a formal hearing before the Interstate Commerce Commission. At that time the motor carriers can file evidence to support their claim. The Commission will then come to a formal decision. But the motor carriers did not do this. The rates still are in effect.